Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1997

UNITED STATES of America, Ex Rel., SEQUOIA ORANGE COMPANY and Lisle Babcock,

Petitioners,

vs.

SUNKIST GROWERS, INC., *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Congress amended the False Claims Act (FCA) in 1986 to achieve increased enforcement and deterrence by making relators full parties, guaranteeing them a bounty, and protecting their status and rights in the event of Government intervention. Defendants defrauded the Government by making false claims and statements under citrus marketing orders that imposed weekly shipment quotas. Relators filed these actions beginning in 1988 for themselves and for the Government to recover treble damages and statutory forfeitures. Relators spent well over $1 million in costs and fees during the next five years, *inter alia*, winning jurisdictional motions, conducting discovery, and expanding the scope of Defendants' potential liability to several hundred million dollars. The Government intervened late based on its promise not to seek dismissal and to litigate the cases if a satisfactory global settlement could not be achieved. The Government conceded the cases had substantial objective merit, but later renegged and, over Relator's vigorous objections, successfully moved to dismiss for "policy" reasons. The FCA guarantees Relators a share of the proceeds of litigation or settlement and protects Relators' status and rights when the Government intervenes. The dismissals made no provision for either recovery of Relators' costs and fees or for their share. The questions presented for review are:

1. Whether as a matter of statutory construction, § 3730(c)(2)(A) provides the Government with authority, independent of the more specific provisions of the FCA governing dismissals and settlements, to seek dismissals on "policy" grounds.

2. Whether in ruling on the motion to dismiss, the district court can abandon the Federal Rules of Civil Procedure, specifically Rules 12(b), and 56, and substitute the highly

deferential "rational basis" test applicable to determine whether executive action violates substantive due process.

3. Assuming *arguendo* that the Government has the power to dismiss these meritorious cases for "policy" reasons, whether Rule 41(a)(2), in order to avoid prejudice, authorizes the district court to award at least the costs and fees of prosecuting these meritorious FCA suits both for the benefit of Relators and for the Government.

4. Assuming *arguendo* that the district court applied the correct standard, whether a "policy" that attempts to justify dismissal when defendants refused to settle and threatened to refuse to participate in negotiations over future regulatory tools satisfies the "rational basis" test.

PARTIES TO THE PROCEEDINGS

The Petitioners are Sequoia Orange Company and Lisle Babcock, which were the Plaintiffs/Appellants below. The Respondent, United States of America, was one of the Plaintiffs/Appellees below. The remaining Respondents, which were Defendants/Appellees below, are Sunland Packing, San Joaquin Citrus, Central Valley Citrus, Grand View Heights, Lindsay Fruit Association, Ivanhoe Citrus Association, Tri County Citrus Association, H & R Citrus, Baird-Neece Packing, Grand View Packing, Sierra Citrus, Klink Citrus, Golden State Citrus, Magnolia Citrus, Visalia Citrus, Orange Cove Packing, Strathmore Cooperative, Sunland Packing, Harding & Leggett, Mission Citrus, Dole Citrus, Blue Banner, Baker Bros. Citrus, Kaweah Citrus, Oxnard Lemon Association, Strathmore Packing, Stark Packing Corp., Stark Packing, Millwood Packing, Ventura Pacific, Saticoy Lemon, Golden Valley, Ventura County, Limonera Co. and Sunkist Growers, Inc.

Petitioner, Sequoia Orange Company, has no parent company and no nonwholly owned subsidiaries.

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Petitioners are Relators in these 34 actions brought under the False Claims Act (FCA), 31 U.S.C. § 3729, *et seq.*, to recover damages and forfeitures resulting from false claims and statements by Defendants in citrus marketing orders issued by USDA under the Agricultural Marketing Agreement Act of 1937 (AMAA), 7 U.S.C. § 601, *et seq.* Even though USDA conceded the cases were objectively meritorious, it moved to dismiss them for "policy" reasons. The district court granted USDA's motions, holding that the protections and standards in Fed. R. Civ. Proc. Rules 12, 41, and 56 did not apply. The Ninth Circuit affirmed. Relators respectfully petition for a writ of certiorari to review the improper dismissal of these actions. The Ninth Circuit's opinion should be vacated and these cases remanded with instructions that Relators' interest in these cases, as directed by Congress, are to be protected by both the Civil Rules and the FCA.

OPINIONS BELOW

The district court's March 3, 1995 opinion (App. C) ruling that the Federal Rules did not apply to USDA's motion is unreported. The district court's Sept. 27, 1995 opinion (App. B) dismissing the cases is reported at 912 F. Supp. 1325 (E.D. Ca. 1995). The Ninth Circuit's June 19, 1998 opinion (App. A) is not yet published but is reported at 98 Daily Journal D.A.R. 6688 and 1998 WL 326866. The judgments are located at Apps. D-Q. The district court's Oct. 26, 1995 opinion (App. R) denying leave to amend the complaints, inter alia, on the ground that such motions are not allowed in FCA cases is unreported.

STATEMENT OF JURISDICTION

The Ninth Circuit issued its opinion and judgment on June 19, 1998. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND RULES INVOLVED

The relevant provisions of the False Claims Act, 31 U.S.C. § 3729, *et seq.*, are found in § 3730. The relevant Federal Rules of Civil Procedure, issued under the Rules Enabling Act, 28 U.S.C. § 2072, are Rules 1, 12, 41, and 56. These statutes and rules are reproduced in App. T.

STATEMENT OF THE CASE.

A. The False Claims Act.

Congress substantially amended the FCA in 1986 to restore and enhance the role of relators in the war against waste, fraud, abuse, and corruption. Congress was indeed prescient in its concern that normal federal enforcement was occasionally ineffective and that bureaucrats motivated by, e.g., bad faith, ill will, or simply a desire to cover up past mistakes or dirty laundry, might try to interfere with legitimate relator enforcement. In order to accomplish its purpose, Congress wisely provided several mechanisms to protect relators and ensure that all meritorious cases were prosecuted. Congress provided that a relator may unilaterally initiate action and brings the action for himself as well as for the government. § 3730(b)(1). The government has the unfettered right to take over an action during the initial 60-day sealing period, § 3730(b)(2), plus court-approved extensions based on the government's showing of "good cause," § 3730(b)(3). It has primary responsibility for the action in such cases, § 3730(b)(4)(A), *but the relator remains a full party*. § 3730(c)(1). Under the previous version of the statute, the relator lost all right to participate and to a share if the Government took over the case or if the Government had the information on which the case was based. Under the amended FCA, the relator remained a party under all circumstances, and was guaranteed a share of the settlement or

judgment plus attorney fees and expenses. § 3730(d)(2). If the Government decides not to initially intervene, then the action is conducted by the relator as sole party, with the Government retaining a right to receive pleadings and depositions. Congress stressed the importance of the role of the relator in conducting the action that it stated this right *twice*. §§ 3730(b)(4)(B), 3730(c)(3). The Government may intervene at a later time, but only with court approval based upon a showing of "good cause." The "status and rights" of the relator must be protected and may not be limited. § 3730(c)(3). If the Government chooses to pursue the claim with an alternative fraud remedy, e.g., in an administrative proceeding, the relator is guaranteed the same participation rights, including a share of the recovery. § 3730(c)(5).

The Justice Department (DOJ) led the fight to restrict jurisdiction with the 1943 amendments and opposed the expanded authority and protection for relators in the 1986 FCA amendments. Interpreting § 3730(c)(2)A) to grant dismissal authority independent of the FRCP and the jurisdictional bars elsewhere in the FCA would undermine the Congressional objectives, eviscerate the protection for relators built into the 1986 amendments, and would give the government authority it lost in Congress and in this Court. Unless this Court allows the writ and reverses the Ninth Circuit, DOJ will use its new-found independent dismissal authority to (as in these cases) throw out relators at or near the end of litigation, to extract unreasonable conditions from relators, to "win" fights with relators (such as public employees) which it has lost under the specific provisions of the FCA, and generally to politicize *qui tam* litigation between an often self-interested agency and usually exceptionally angry and aggressive defendants. Neither USDA's hasty abandonment of its prior construction of § 3730(c)(2)(A) nor the lower courts' uncritical acquiescence should rebalance the bargain between government and relators struck by Congress in the 1986 amendments.

B. The Agricultural Marketing Agreement Act.

Sequoia Orange Company (Sequoia) brought 33 of these consolidated actions against Sunkist and its member packinghouses beginning in December, 1988. An additional action was brought by Lisle Babcock against Dole Citrus. Each of the pattern complaints alleges that the Defendants (Sunkist packinghouse, both in a conspiracy with Sunkist and separately, and Dole Citrus) failed to report or falsely reported their citrus shipments (oranges and lemons) to USDA.

USDA imposed quotas on the weekly and seasonal shipment of oranges and lemons grown in Arizona and California between the Depression and December, 1992.[1] The quota regulations were issued under marketing Orders authorized by the Agricultural Marketing Agreement Act of 1937.[2]

The object of the false reporting scheme was to obtain more quota and to avoid paying penalties and forfeitures[3] equal to the market value of citrus shipped in excess of quotas. App. 28a.

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1. Secretary Madigan suspended the quotas for the remainder of the season on December 14, 1992. Secretary Espy announced in June 16, 1993 that the quota suspension would continue until the industry could agree on new quota and enforcement rules. Secretary Espy finally terminated the three citrus Orders altogether on August 26, 1994, citing massive cheating and continued divisiveness over the necessity and efficacy of quotas.

2. The operation of the AMAA, Orders, and quota regulations are described in more detail in the following cases: *Sequoia v. Yeutter*, 973 F.2d 752 (9th Cir. 1992); *Riverbend v. Madigan*, 958 F.2d 1479 (9th Cir. 1992); *United States v. Riverbend*, 847 F.2d 553 (9th Cir. 1988); *Pescosolido v. Block*, 765 F.2d 825 (9th Cir. 1985); and *NOAC v. Exeter Orange Co.*, 722 F.2d 449 (9th Cir. 1983).

3. 7 U.S.C. §§ 608a(5), 608c(14).

Defendants thus made both direct and so-called "reverse" false claims actionable under 31 U.S.C. §§ 3729(a)(1), (2), (3), and (7). Defendants devised a diabolical scheme to cheat both USDA and their competitors. Sunkist controlled the industry administrative committees, which in turn controlled the level of quota and the enforcement/compliance function. It was almost the "perfect crime." They could cheat with impunity, but for the False Claims Act's post-1986 revival of qui tam enforcement.

"The government was originally hostile to Sequoia's suits." App. 90a. USDA moved to dismiss the Sunland "test" case, claiming there was no jurisdiction under the FCA to punish false claims and statements made in connection with quota programs imposed under the AMAA. The Court denied USDA's motion on July 5, 1989. Defendants made a similar motion, which was denied on July 25, 1990. USDA renewed its motion to dismiss in connection with the four lemon Order cases, hoping for a different ruling from a different district judge. USDA's motion to dismiss was again denied on May 5, 1992.

The orange Orders were ultimately held unenforceable based on USDA's July 24, 1984 finding pursuant to 7 U.S.C. § 608c(16)(A), that, without several amendments, they no longer effectuated the purposes of the AMAA. App. 32a. *Sunny Cove v. Espy*, 854 F. Supp. 669, 697 (E.D. Cal. 1994). USDA reversed its position on jurisdiction in a memorandum dated November 3, 1992, App. 31a, which was submitted to the Court on the question of the continued enforceability of orange quotas following the Ninth Circuit's decision in *Sequoia v. Yeutter*, 973 F.2d 752 (9th Cir. 1992). USDA argued that the FCA cause of action would survive the unenforceability of the quotas under the AMAA because the FCA provided an effective alternative remedy, relying on *United States v. Kapp*, 302 U.S. 214 (1937) (false claims under predecessor to AMAA).

USDA proposed a "global settlement" offer (covering both FCA cases brought by Relators and AMAA cases brought by USDA) on June 18, 1993, App. 30a, and moved to intervene in these FCA cases. The Court granted permission to intervene on September 13, 1993, App. 30a-31a, based in part on representations by the Assistant U.S. Attorney that he would effectively litigate these FCA cases whether or not settlement was reached. USDA's Deputy AMS Administrator Clayton specifically promised that

> [w]e have not, and will not, recommend a blanket amnesty for past prorate violations, since the violations alleged are substantial and evidence a willful and flagrant disregard for binding federal regulations.

App. 68a, 95a-96a. USDA thus further acquiesced in and agreed with Sequoia's position[4] that the Court has jurisdiction over these cases.

Sequoia vigorously objected to intervention, claiming that USDA was trying to force a "sweetheart deal." App. 31a. Sequoia's fears were more than well-founded, USDA having delivered the ultimate "deal" to Defendants of the forced dismissals at issue here.

Various settlements were attempted during the year preceding USDA's motion to dismiss, ranging from approximately $3 to $20 million. USDA unexpectedly announced on May 16, 1994, that it was terminating all three California-Arizona citrus orders, dismissing all pending AMAA cases, and withdrawing from the

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4. Examples include USDA's memorandum supporting its motion to intervene, its Third Amended Complaint in Magnolia, and oral representations made to the Court during the August 9, 1993 hearing on USDA's motion to intervene and during the January 28, 1994 hearing on Sequoia's motion to amend the existing complaints.

pending FCA cases so that Relators could continue prosecution. App. 70a. These 34 FCA cases would continue to be prosecuted by Relators. Although couched as a single "policy," these were actually separate decisions taken for separate reasons. USDA's "decision" to dismiss the AMAA cases was not a voluntary amnesty program, but was instead the result of judicial invalidation of post-1984 quotas. USDA had to drop its AMAA claims because it refused or was unable to provide the explanation and/or engage in corrective rulemaking following the Court's decision in *Sunny Cove v. Espy*, 854 F. Supp. 669 (E.D. Cal. 1994) invalidating shipment quotas. Finally, the Orders were terminated because any further use of quotas was economically unjustified and too divisive, and because of the massive cheating revealed in these cases. App. 34a. 59 Fed. Reg. 44020 (Aug. 26, 1994).

Defendants immediately mounted a campaign (including grassroots letters, intervention through counsel, and Congressional letters) to get these FCA cases dropped. An internal USDA briefing paper prepared by the Office of General Counsel after the May 16 announcement correctly stated that USDA lacked the legal authority to seek dismissal of these meritorious cases. Other agency constructions of the FCA, an internal Department of Justice memo and Congressional testimony by DOJ's Gerson, confirmed that § 3730 did not provide an independent basis to seek dismissal on "policy" grounds.

Pressure and political influence eventually prevailed over Constitutional duty and USDA's prior commitments to the district court. USDA General Counsel Gilliland wrote to Assistant Attorney General Hunger on May 20, 1994 to request dismissal of these cases:

> Throughout our consideration of the legal and factual circumstances surrounding these cases, it has been the Department's understanding that the False

> Claims Act does not provide the government with an alternative statutory basis to achieve dismissal of these cases. Counsel for several *qui tam* defendants have recently suggested to us and to your staff that the False Claims Act (31 U.S.C. § 3730(c)(2)(A)) may in fact contain additional authority for the government to seek and achieve dismissal. We are therefore requesting your advice on this issue. If a government motion to dismiss all *qui tam* cases is authorized by this provision, or any other provision of the False Claims Act, the Department of Agriculture would strongly support such a motion.

DOJ's Assistant Director, Commercial Litigation, Steve Altman wrote to defense counsel Manock on August 1, 1994 analyzing litigation risk for Defendants of at least $30 million. He concluded:

> Finally, as I have stated, I do not believe that dismissal of these cases would end litigation between Sequoia and Sunkist. Sequoia has already stated that it will refile RICO, antitrust and common law actions. In addition, you have argued that the government should treat your clients like all other AMAA violators. This would be accomplished if the United States accepts your request that it take no portion of the proceeds of a settlement. Your clients would then be in a position of settling a private action, as if the *qui tam* actions had not been filed. I have stated I would recommend this — but it is up to your clients to make this happen. When you consider the substantial costs and risks involved in not settling now, I think that a settlement at a number far above those you are considering [$1,5 million] is in everyone's best interest.

Defense counsel Wilkinson wrote back on August 3, ER 365-378, making the incredible claim that the cases had to be dismissed because settlement talks had proven

> fruitless. . . . The only avenue left to end the acrimonious litigation involving the terminated citrus marketing orders is an announcement by the United States that it will move to dismiss the outstanding [and future FCA cases].

USDA moved to dismiss these cases on August 31, 1994, claiming an absolute right to force a dismissal under § 3730(c)(2)(A). Judge Wanger held a hearing on the motion on October 24, 1994. He rejected USDA's argument in his March 3, 1995 opinion, App. 86a, 102a-107a, but scheduled an evidentiary hearing to permit USDA to prove that forced dismissal served a legitimate governmental interest, and was not arbitrary, capricious, or illegal. He paid lip service to the desire of Congress that meritorious cases be prosecuted by relators despite governmental inability, unwillingness, or lack of political will,[5] but cobbled

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5. Additional grounds for an evidentiary hearing can arise upon a showing that the dismissal is unreasonable in light of existing evidence or that the Government has not fully investigated the allegations. Both of these grounds concern whether the dismissal is rationally related to a legitimate governmental interest. . . . The purpose of the FCA is to combat fraud against the Government. Congress enacted the *qui tam* provisions to ensure that fraud would be prosecuted even if the Department of Justice was unable or unwilling to pursue the case. The 1986 Amendments to the FCA, and the *qui tam* provisions generally, support the prosecution of meritorious cases. . . . Congress, wary of erosion of the Department of Justice's political will to prosecute certain cases, sought to prevent the arbitrary dismissal of meritorious cases. . . .

App. 114a.

together a standard more akin to judicial review of agency rulemaking than to the familiar standard under the FRCP governing judicial decisions dismissal/summary judgment motions. A four-day hearing was held in June of, 1995. App. 35a. He granted USDA's motions on September 27, 1995. App. 81a-84a. Sequoia asked the Court for an opportunity to amend the Complaints to allege non-FCA actions and for an FRCP 54(b) order of partial finality to permit an appeal to this Court of the FCA dismissal while the remainder of claims proceeded forward free of USDA intervention. Judge Wanger ruled on October 26, 1995 that Sequoia had no right to amend the Complaints because of its status as an FCA relator. App. 151a.

The Ninth Circuit affirmed on June 19, 1998. The Court correctly observed that the FCA requires a hearing on USDA's motion and that it provides no standard different from the Federal Rules for ruling on the motion. App. 6a. However, it went on to approve the highly deferential standard for ruling on USDA's motion to dismiss, claiming that standard is the same as applied to determine whether executive action violates substantive due process, App. 11a-13a, and the minimal scrutiny given to the exercise of prosecutorial discretion, App. 11a-13a. The Court did not analyze or explain why USDA's motion was not governed by Rules 12 and 56. Regarding the applicability of Rule 41(a)(2) (protection against prejudicial dismissals), the Court wrongly commented in passing, App. 11a, that the Rule only protected defendants from prejudice, not plaintiffs. The panel did not address the district court's conclusion that FCA relators could not amend their complaints to allege non-FCA causes of action. App. 16a.

REASONS FOR GRANTING THE WRIT

The writ should be granted because the district court's decision to abandon the decisional standards and protections of the Federal Rules of Civil Procedure and the FCA completely upsets the

enforcement scheme established by Congress, not only in these cases (excusing and rewarding what USDA described as "massive" cheating by a politically powerful segment of the citrus industry) but in every qui tam case in the future. Unless corrected by this Court, the district court's abandonment of the traditional judicial function will eviscerate the FCA of its incentives and protections for relators and leave them to the mercy and whim of the Executive Branch — contrary to the language and intent of Congress. As a case of first impression, this Court should address the questions presented by these cases now because of their importance to the future of the FCA. Moreover, the district court's departure from the protection afforded by the Federal Rules calls for an exercise of this Court's supervisory power. Finally, the Ninth Circuit's decision conflicts with established precedent in this Court. Reversal is vital to the FCA's qui tam enforcement scheme.

I.

THE LOWER COURTS WRONGLY DECIDED AN IMPORTANT FEDERAL QUESTION OF FIRST IMPRESSION.

a. The Ninth Circuit erroneously concluded that USDA's motion to dismiss was not governed by the Rules of Civil Procedure. The plain text of the FCA and its legislative history demonstrate that meritorious cases cannot be dismissed on "policy" grounds. The absence of an express standard for decision in the FCA did not leave the district court free to adopt its own standard.

As a matter of routine statutory construction, the FCA does not allow for dismissal of meritorious cases on "policy" grounds.[6]

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6. In the only two reported decisions on point, both involving the pre-1986 version of the FCA, the courts categorically rejected non-jurisdictional "policy" dismissals similar to these cases. *U.S. ex rel. Weiss*

(Cont'd)

First, the many specific dismissal provisions in the FCA, *e.g.* § 3730(e)(4) (prior public disclosure), argue against any additional independent basis for dismissal in § 3730(c)(2)(A). Second, such a loophole produces an impermissible absurd result. While *settlements* of meritorious cases under § 3730(c)(2)(B) must be fair, adequate, and reasonable under all the circumstances, a "policy" dismissal for $0 would completely undermine the protection of the standard for meritorious settlements. All of USDA's "policy" considerations should have been analyzed against this settlement standard in § 3730(c)(2)(B).

Congress was not silent on the matter of what standard should be applied to USDA's motion to dismiss. While earlier versions of the 1986 FCA amendments made the hearing on the motion optional, requiring a threshold showing by relator, the plain text ultimately adopted made the hearing mandatory. As noted above, the legislative history to the final version explained that Congress sought to achieve greater enforcement by making relators full parties protected by the Federal Rules.

> The final version of the Bill preserves and strengthens the role of the person initiating the action

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(Cont'd)

v. Schwartz, 546 F. Supp. 422, 428 (N.D. Cal. 1982) (vacating stipulated dismissal between government and defendants; "Congress intended for the honest informer to retain his right to prosecute fraud against the Government. That right may be taken over, but it may not be taken away."); *U.S. ex rel. Coates v. St. Louis Clay Prod. Co.*, 58 F. Supp. 902, 904-05 (E.D. Mo. 1946) ("The purpose of the informer statute, as now on the books, is to permit citizens to prosecute this class of action when the Government has failed to do so by failure either to initiate or to take over."); *Sherr v. Anaconda Wire & Cable Co.*, 149 F.2d 680 (2d Cir. 1945); *United States v. B F Goodrich Co*, 41 F. Supp. 574, 575 (D.C.N.Y. 1941). Logically, "policy" dismissals must be rejected with even greater vigor in view of the upgrades and protections for relators provided by Congress in 1986.

> even if the Government enters the case. The law makes clear that this person ("qui tam" plaintiff) will be a "party" to the action with all the rights and responsibilities that a party receives under the Federal Rules of Civil Procedure.

132 Cong. Rec. H9388 (Oct. 7, 1986) (relevant portions of the conference report are reproduced in App. U, 179a). *See also, e.g.*, S. Rep. No. 345, 99th Cong., 2d Sess. at 4-8, 23-26 (1986) reprinted in U.S. Code Cong. and Admin. News p. 5266; H.R. Rep. No. 660, 99th Cong. 2d Sess. at 22-24, 30-31; 132 Cong. Rec. H6482 (Sept. 9, 1986) (Rep. Berman), *id.* at H6483 (Rep. Bedell), S11243 (Aug. 11, 1986) (Sen. Grassley), S15036 (Oct. 3, 1986) (Sen. Grassley).

Aside from unequivocal Congressional intent to protect relators as parties under the Federal Rules, nothing in the FCA repeals these rules, which have the force and effect of law. *See, e.g., Leatherman v. Tarrant County Narcotics Unit*, 113 S. Ct. 1160 (1993) (no heightened pleading requirement in civil rights cases; ordinary FRCP standards govern); *Griffith Co. v. NLRB*, 545 F.2d 1194 (9th Cir. 1976); *Crescent Wharf & Warehouse Co. v. Pillsbury*, 259 F.2d 850 (9th Cir. 1958); *American Fed. of Musicians v. Stein*, 212 F.2d 679 (6th Cir. 1954); *Hicks v. Bekins Moving & Storage Co.*, 115 F.2d 406 (9th Cir. 1940); *see also Hanna v. Plummer*, 380 U.S. 460 (1965).

b. Assuming, arguendo, that USDA could as a theoretical matter seek dismissal of these meritorious cases, then the Ninth Circuit mistakenly concluded that the protection against prejudice afforded by Rule 41(a)(2) did not apply to Relators. Although the panel correctly conceded that Relators were prejudiced by precluding their bounty, App. 11a, it limited the scope of Rule 41(a)(2) to protect defendants against vexatious plaintiffs, App. 11a. It based its narrow construction on a misreading of this Court's opinion in *Cooter & Cell v. Hartmarx Corp.*, 496 U.S. 384, 397 (1992). *Hartmarx* is totally inapposite. The dismissal in *Hartmarx*

was a voluntary dismissal pursuant to Rule 41(a)(1) because the defendant had not yet filed an answer or motion for summary judgment. The defendants in the instant cases have filed answers thereby making Rule 41(a)(2) applicable. That rule conditions dismissals "upon such terms and conditions as the court deems proper." Nothing in the text of the rule limits its protection to defendants. Indeed, Rule 41 speaks generally in terms of preventing voluntary dismissals after service by an "adverse party" of an answer or a motion for summary judgment and allowing voluntary dismissals without court order only by stipulation "signed by all parties."

The panel failed to address the recent Ninth Circuit case. *Joanna Russ v. Standard Insurance Company, an Oregon Corporation*, 120 F.3d 988 (9th Cir. 1997) (reversing Rule 41(a)(2) dismissal because it was sought for the improper purpose of renewing an untimely jury demand). The Court held that the general authority to grant and condition dismissals in Rule 41(a)(2) must give way to the more specific limitations in other Rules, i.e. the requirement in Rule 38 for a timely jury demand. Applied to these cases, dismissal should have been denied because the purpose of the motion was to circumvent the restrictions in Rules 12 (both defendants and USDA having lost previous motions) and 56 that prevent the forced dismissal of meritorious cases. As in *Russ*, USDA is improperly trying to achieve indirectly what it could not achieve directly under Rules 12 and 56. *Id.* at 990.

As noted above, nothing in Rule 41 limits its protection to defendants. The panel also failed to address the plain text of the Rule and cases which explain that the Rule requires the district court to consider the equities of all parties. *Ohlander v. Larson*, 114 F.3d 1531, 1537 (10th Cir. 1997) (district court abused its discretion by not considering equities facing both defendants and plaintiffs). Relators are aware of no caselaw that supports the panel's narrow construction of Rule 41(a)(2) that excludes

plaintiffs from its protection. *Cf.* 9 Charles Alan Wright and Arthur R. Miller, Federal Practice and Procedure § 2364 at 278, 297 (2d ed. 1994); Wright & Miller, Federal Practice and Procedure § 2362 (action can be dismissed "when no other *party* will be prejudiced."); *see, e.g., Austin v. Pa. Dept. of Corrections*, 876 F. Supp. 1437 (E.D. Pa. 1995); *Burnette v. Goldshall*, 828 F. Supp. 1439 (N.D. Ca. 1993); *Greenberg v. Centrum Inv. Group, Inc.*, 145 F.R.D. 610 (S.D. Fl. 1993); *Read Corp. v. Ribco Equip. Co.*, 145 F.R.D. 288 (D.N.H. 1993); *Beaver Associates v. Cannon*, 59 F.R.D. 508 (S.D.N.Y. 1973) (absent current and potential class members); *Hudson Engineering Co. v. Bingham Pump Co.*, 298 F. Supp. 387 (S.D.N.Y. 1969) (other plaintiffs); *In Re Phillips Pet. Secs. Lit.*, 109 F.R.D. 602 (D. Del. 1986) (other plaintiff class members).

There is no dispute that Relators suffered legal prejudice as a result of these dismissals. Once such legal prejudice was conceded, dismissal should have been denied (in favor of settlement, for example) or the district court should have devised "terms and conditions" to protect Relators. *Westlands Water Dist. v. United States*, 100 F.3d 94, 98 (9th Cir. 1996) (Judge Wanger ordered to grant Rule 41(a)(2) motion and remanded for calculation of attorney fees and costs); *Cantrell v. Intl. Bhd. of Elec. Workers, AFL-CIO, Local 2021*, 69 F.3d 456 (10th Cir. 1995); *Koch v. Hankins*, 8 F.3d 650, 652 (9th Cir. 1993) (requiring compensation for work rendered useless). At a minimum, Relators were entitled to a "make whole" award of fees and expenses under this Rule. *See, e.g., In re Lowenschuss*, 67 F.3d 1394, 1403 n.5 (9th Cir. 1995); *Kern v. TXO Production Corp.*, 738 F.2d 968, 972 (8th Cir. 1984) ("The rule has long prevailed in both law and equity that a plaintiff may dismiss the case without prejudice only by payment of the costs. . . ." *quoting Home Owners' Loan Corp. v. Huffman*, 134 F.2d 314, 317 (8th Cir.1943)).

The panel's claim that the deferential "rational relation" test avoids any separation of powers concerns is also wrong. This Court

rejected the idea in *Morrison v. Olson*, 487 U.S. 657 (1988), that the executive must have the power to stop litigation. The separation of powers doctrine is not violated so long as the executive retains "sufficient control" over litigation. The Ninth Circuit applied this analysis to uphold the FCA against a separation of powers attack in *U.S ex rel. Kelly v. Boeing*, 9 F.3d 743 (9th Cir. 1993). The "sufficient control" afforded the executive in FCA cases, which includes the power to settle measured by the district court against a reasonableness standard, § 3730(c)(2)(B), and the power to dismiss a case that "has no merit," *id.* at 753, is well within the outer boundaries sketched by this Court in *Morrison*. *See Confederated Tribes of Siletz Indians of Oregon v. United States*, 110 F.3d 688 (9th Cir. 1997) (Congress in Indian Gaming Regulatory Act properly authorized state governors with "veto" over certain decisions by Secretary of Interior regarding Indian gaming). The Ninth Circuit analogized a governor's "veto" power under IGRA to the authority of relators under the False Claims Act upheld against constitutional challenges in *U.S. ex rel. Kelly v. Boeing*, 9 F.3d 743, 758-59 (9th Cir. 1993), in which

> this court was called upon to interpret "significant authority" in the context of qui tam relators under the False Claims Act. The Act authorized individuals to sue on behalf of the federal government for vindication of public rights. Although the Federal Government is given the opportunity to intervene in the lawsuit, the individual relator has the opportunity to continue the lawsuit even if the Government believes that such a suit is not warranted. We determined that the authority exercised by relators was not so significant as to require appointment.

The panel's crabbed construction of § 3730(c)(2)(A) raises the far more serious constitutional concern. The ability to forcibly

stop litigation violates the duty imposed by the Framers on the Executive to take care that the laws be faithfully executed. U.S. Const., Art. I, § 3. The Executive's constitutional duty to faithfully execute the laws does not authorize abandonment[7] of that duty. *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 578-79 (1952) ("To 'execute' a statute . . . emphatically does not mean to kill it."); *see also* Miller, *The President and the Faithful Execution of the Laws*, 40 Vand. L. Rev. 389, 397-398 (1987); Declaration of Independence, July 4, 1776 (condemning King for having "refused his assent to laws, the most wholesome for the public good"). USDA's attempt to wrap its political desire to sanction Defendants' lawlessness in constitutional cloth lies between irony and the arrogance of a supreme monarch exercising the royal dispensing power.

The "royal dispensing power" which USDA here seeks to revive and reclaim is utterly abhorrent and alien to the American ideal of Rule of Law, and had been repeatedly condemned by the courts. *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 545-47, 612-13 (1838) (duty to faithfully execute the laws does not include the power to ignore them); *Ameron, Inc. v. Corps of Engineers*, 610 F. Supp. 750 (D.N.J. 1975), *affirmed*, 787 F.2d 875, *modified*, 809 F.2d 979 (3d Cir. 1986), *cert. dismissed*, 109 S. Ct. 297 (1988); *Lear Siegler, Inc. v. Lehman*, 842 F.2d 1102, 1119, 1121, 1123-24 (9th Cir. 1988), *vacated on other grounds*, 893 F.2d 205 (9th Cir. 1988) (en banc). *See also United States v. Smith*, 27 F. Cas. 1192,

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7. Even in *Heckler v. Chaney*, 470 U.S. 821, 833 n.4 (1985) (subject to control by Congress, agency decision not to initiate prosecution normally not reviewable under APA), the Court warned against an express policy like USDA's "that is so extreme as to amount to an abdication of its statutory responsibilities." *Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973) (allegation that agency adopted policy that abdicated its statutory enforcement duty, not a challenge to the exercise of discretion in a few cases in a generally effective enforcement program).

1230 (Cir. Ct. D.N.Y. 1806); *De Costa v. Nixon*, 55 F.R.D. 145, 146 (E.D.N.Y. 1972); *Catano v. Local Board*, 298 F. Supp. 1183, 1188 (E.D. Pa. 1969). Thus, Judge Wanger's conclusion, that "[t]he ultimate choice to forego prosecution of lawbreakers is political, vested in the Executive Branch, which possess the power to grant amnesty" is contrary to our historical tradition, the Constitution's express commitment of powers and duties to the three branches, and has been flatly rejected by the Supreme Court.

This Court relied on *Morrison* in its seminal constitutional analysis in *U.S. ex rel. Kelly v. Boeing*, 9 F.3d 743, 755-57 (9th Cir. 1993). This Court found the qui tam mechanism constitutional because the Executive retained "sufficient control" over FCA litigation and the roles of relators and the judiciary were well within the bounds marked by Morrison. The reference in this Court's analysis to the Executive's ability to seek dismissal of cases "that lack merit" triggered the Rule 56 standard. A prohibition on policy dismissals outside the protection of the Federal Rules is the logical result of this Court's extensive analysis in *Kelly*, and is still well within the bounds approved in *Morrison* because Congress in the Ethics Act denied the Executive any power to stop cases. Relators' construction does not change the Kelly analysis in any way. USDA still has all the various "control" mechanisms identified as "sufficient" in *Kelly*. The one "power" it can't exercise is abandonment of the law.

c. Finally, the panel misapplied the rational basis test. It concluded first that "[p]eace among competitors and regulators facilitates orderly marketing." App. 13a. But every policy statement from USDA and the caselaw emphasize that the hallmark of these marketing orders, especially the ones like these involving the greatest displacement of competition, is strict and full enforcement. There can be no compliance and deterrence without meaningful detection and litigation. Indeed, the Secretary cited the widespread noncompliance and massive cheating as the basis for the ultimate termination of these programs.

The panel next dismissed Relator's claim that the decision to seek dismissal was tainted by improper political influence. App. 14a. But the panel completely failed to analyze the record evidence that showed that the only intervening factor between USDA's May 16, 1994 decision to withdraw from the FCA cases and its May 20 decision to seek dismissal was pressure from the industry's largest and most powerful cooperative, Sunkist, a long-time "client" to which USDA deferred in matters of local administration. App. 39a-42a, 71a-75a. Thus, all of the factors ultimately offered by USDA to allegedly justify the dismissal decision were mere pretext.

The panel next succumbed, again without any analysis, to USDA's claim that forced dismissal was the only equitable solution. It is obviously inequitable to the 75+ companies who did not cheat, and to the dozens of companies that settled enforcement actions over the years, to allow the 34 companies, Defendants in these actions, to keep their ill-gotten gain from the citrus black market. Even among the cheaters, some violations were quite large while others were relatively minor. The panel completely fails to explain why a reasonable global settlement, submitted for district court approval, was not the rational solution.

The panels uncritical acceptance of USDA's alleged "litigation burden" justification suffers this same defect, i.e. why not settle rather than dismiss. App. 14a-15a. The record doesn't contain even a shred of cost-benefit analysis to support USDA's claim. While the Government certainly has the right to plan and/or abandon its litigation efforts on the basis of resource decisions, one of the key reasons for the 1986 FCA amendments was Congress' desire to enlist private resources in the anti-fraud enforcement effort.

Finally, the panel approved USDA's dismissal of the 4 lemon cases even though that program concededly did not suffer from many of the legal deficiencies that had rendered the orange

regulations unenforceable (except under the FCA). App. 15a. USDA had nothing but vague suspicions that the black market was as widespread in the lemon industry. Even if their had been solid proof, the solution for greater cheating is greater enforcement, not wholesale abandonment.

II.

THE NINTH CIRCUIT'S DECISION IS IN DIRECT CONFLICT WITH CONTROLLING PRECEDENT FROM THIS COURT.

The Supreme Court recently warned the lower courts not to invent new decisional standards, based on seemingly prudent policy considerations, in place of the standards set forth in the Federal Rules. *Amchem Products, Inc. v. Windsor*, 117 S. Ct. 2231 (1997) (requirements for class certification under Rule 23 must be satisfied in determining propriety of certification of settlement-only class).

The Court just last term in *Hughes Aircraft Co. v. U.S. ex rel. Schumer*, 117 S. Ct. 1871(1997), approved of the Relators' interest under the FCA as separate and distinct from that of the federal prosecutor, at least implicitly rejecting the Ninth Circuit's reliance on the unfettered prosecutorial discretion of the so-called "real" party in interest:

> The extension of an FCA cause of action to private parties in circumstances where the action was previously foreclosed is not insignificant. As a class of plaintiffs, qui tam relators are different in kind than the Government. They are motivated primarily by prospects of monetary reward rather than the public good. As we have previously recognized:

> "[Qui tam statutes are] passed upon the theory, based on experience as old as modern civilization, that one of the least expensive and most effective means of preventing frauds on the Treasury is to make the perpetrators of them liable to actions by private persons acting, if you please, under the strong stimulus of personal ill will or the hope of gain. Prosecutions conducted by such means compare with the ordinary methods as the enterprising privateer does to the slow-going public vessel." United States ex rel. Marcus v. Hess, 317 U.S. 537, 541, n. 5, 63 S.Ct. 379, 383, n. 5, 87 L.Ed. 443 (1943) (quoting United States v. Griswold, 24 F. 361, 366 (D.Or.1885)).

Qui tam relators are thus less likely than is the Government to forego an action arguably based on a mere technical noncompliance with reporting requirements that involved no harm to the public fisc. [footnote 5: That a qui tam suit is brought by a private party "on behalf of the United States," see Brief for Respondent 17, does not alter the fact that a relator's interests and the Government's do not necessarily coincide. Moreover, as the statute specifies, qui tam actions are brought both "for the person and for the United States Government." 31 U.S.C. § 3730(b)(1) (emphasis added).]

In permitting actions by an expanded universe of plaintiffs with different incentives, the 1986 amendment essentially creates a new cause of action, not just an increased likelihood that an existing cause of action will be pursued.

Id. at 1877-78.

The Supreme Court rejected USDA's "control" and "policy" arguments long ago in the seminal case of *U.S. ex rel. Marcus v. Hess*, 317 U.S. 537, 547 (1942) (rejecting government claim that allowing relator without any original information to force civil litigation following criminal prosecution impermissibly interfered with executive function and prosecutorial discretion). This Court explained:

> The government presses upon us strong arguments of policy against the statutory plan, but the entire force of these considerations is directed solely at what the government thinks Congress should have done rather than at what it did. It is said that effective law enforcement requires that control of litigation be left to the Attorney General; that divided control is against the public interest; that the Attorney General might believe that war interests would be injured by filing suits such as this; that permission to outsiders to sue might bring unseemly races for the opportunity of profiting from the government's investigations; and finally that conditions have changed since the Act was passed in 1863. But the trouble with these arguments is that they are addressed to the wrong forum.

Id. at 547. *See* App. 183a (excerpts of U.S. Amicus brief in *Marcus v. Hess* for unsuccessful argument for seeking dismissal authority on Policy grounds.)

III.

THE STANDARD APPLICABLE TO MOTIONS TO DISMISS IS A QUESTION OF FIRST IMPRESSION AND ONE OF VITAL IMPORTANCE TO THE FCA ENFORCEMENT SCHEME CRAFTED BY CONGRESS THAT SHOULD BE SETTLED NOW BY THIS COURT.

The decision in these case is not only important to the future of the citrus industry, but to hundreds of cases now pending under the FCA and countless thousands to be brought in the future.[8] These 34 cases represent hundreds of millions of dollars worth of wealth transfer as a result of the black market that went unchecked for years. These Defendants retain a huge economic advantage over their competitors, especially valuable as the industry moves from two generations of strict quotas to a free market. Most fundamentally, there can never be that illusive "peace" sought by USDA until there is a measure of justice from the companies that broke the rules, especially since Sunkist and its houses had majority control over industry administrative committee decisions. How can the "independents," and even the honest members of Sunkist, trust USDA to fairly administer a future regulatory program when so many past violations remain unremedied?

Far more important, if let stand, this decision will adversely affect every pending FCA case and all those yet to be filed. The

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8. According to DOJ statistics as of October, 1997, total recoveries from 2000 qui tam cases filed since the 1986 amendments to the FCA exceeded $1.83 billion. An economic analysis prepared by Taxpayers Against Fraud of the impact of the 1986 amendments estimates that qui tam recoveries over the next decade will range between $6.9 and $9.3 billion. Deterrence of fraud due to the qui tam provisions of the amended Act for their first ten years of existence (1986-1996) is estimated as between $35.6 billion and $71.3 billion, and for their second ten years of existence (1996-2006) is estimated as between $105.1 billion and $210.1 billion, even assuming a conservative estimate of deterrent effect.

Government's ability to dismiss FCA cases with only "rational basis" scrutiny effectively eviscerates the guts of the FCA–the increased financial incentives and statutory guarantees passed by Congress in 1986.

Another factor justifying allowance of the writ is that the rational basis test, now set in stone, was the result of a hasty, ill-conceived and abrupt reversal of the longstanding construction of § 3730(c)(2)(A) by USDA[9] and DOJ[10] that it did not provide an independent basis to seek dismissal. Had the Government had this authority in the past, bona fide relators would have been unable to vindicate their rights, as the cases would have simply been dismissed. *See, e.g., U.S. ex rel. Williams v. NEC Corp.*, 931 F.2d 1493 (11th Cir. 1993).

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9. An internal USDA memorandum, and USDA Associate General Counsel Golden's testimony, explain that USDA did not believe § 3730(c)(2)(A) provided an independent basis to seek dismissal. App. 39a-40a.

10. *See, e.g.*, 11 Op. Off. Legal Counsel, DOJ 248 at * 10, * 17, * 25-26 ("[T]he provisions permit a private citizen to sue on behalf of the Government, even though the Attorney General may have decided not to prosecute the claim. This power removes from the Executive Branch the prosecutorial discretion that is at the heart of the President's power to execute the laws. Second, the qui tam provisions vest in the relator a voice in crucial litigation decisions, even if the Attorney General decides to enter the suit. The Attorney General may not move to dismiss the suit, settle the action, or restrict the relator's participation except by permission of the court. . . . When a dispute arises between the Attorney General and the relator, the ultimate decision is left to the discretion of the court."); Statement of Stuart M. Gerson, Assistant Attorney General, Civil Division, U.S. Dept. of Justice, Subcommittee on Administrative Law and Governmental Relations of the Committee on the Judiciary, House of Representatives, False Claims Act Technical Amendments Act of 1992, H.R. 4563, April 1, 1992, at 7, 24-26 ("In sum, when a case is truly frivolous or presents no evidence, we believe that we have authority unilaterally to dismiss it. Clarifying legislative changes could be made that would eliminate the need for us to litigate this issue.").

CONCLUSION

The writ should be granted for the reasons set forth above. The erroneous decision in these cases present questions of overwhelming national importance to the construction and operation of the FCA.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DECIDED JUNE 19, 1998

UNITED STATES of America, Ex Rel., SEQUOIA ORANGE COMPANY; Lisle Babcock, Plaintiffs-Appellants,

v.

STRATHMORE PACKING HOUSE COMPANY; Millwood Packing Inc.; Blue Banner Company Inc.; Ventura County Fruit Growers, Inc.; Limonera Company, Defendants-Appellees.

Kendall L. Nanock, Fresno, California, for Grand View defendants-appellees.

No. 96-15024.
United States Court of Appeals,
Ninth Circuit.
Argued and Submitted Oct. 7, 1997.
Decided June 19, 1998.

* * *

Appeal from the United States District Court for the Eastern District of California; Oliver W. Wanger, District Judge, Presiding.

Before: SNEED, SCHROEDER and BRUNETTI, Circuit Judges.

SCHROEDER, Circuit Judge:

Appendix A

This is a qui tam case under the False Claims Act (FCA). One citrus company seeks damages from other citrus companies, claiming that they made false statements to the government in connection with a citrus marketing program. The government intervened several years after the litigation began and sought dismissal under 31 U.S.C. § 3730(c)(2)(A) because it had decided to abandon the entire marketing program. The case must be seen against the background of a war in the citrus industry related to the administration of that program. The district court granted the government's motion to dismiss, finding that the government's decision to end that war on all fronts, including dismissal of the qui tam claims, was rationally related to a legitimate governmental purpose. *See United States ex rel. Sequoia Orange Co. v. Sunland Packing House Co.*, 912 F.Supp. 1325 (E.D.Cal.1995).

The qui tam relators appeal contending that because the false claims actions had some merit, the government cannot seek dismissal. The appeal thus requires us to consider what standard a court should apply when considering the government's motion to dismiss a qui tam action that otherwise would not be dismissed before the litigation was fully resolved. We affirm.

BACKGROUND

Sequoia Orange Company (an orange processor) and Lisle Babcock (an orange grower) filed 34 qui tam actions against a number of citrus industry growers and packinghouses alleging violations of the orange and lemon marketing orders promulgated by the Secretary of Agriculture pursuant to the Agricultural Marketing Agreement Act of 1937 (AMAA), 7 U.S.C. §§ 601-626. The relators began filing the actions in 1988.

Appendix A

The AMAA "authorizes the Secretary of Agriculture to issue marketing orders limiting the quantity of commodities shipped into markets identified by the Secretary, thus protecting prices for producers and maintaining orderly marketing conditions." *Cecelia Packing Corp. v. USDA*, 10 F.3d 616, 618 (9th Cir.1993). The Secretary in 1984 had issued orange and lemon marketing orders that regulated the quantity of oranges and lemons shipped to market by citrus handlers in Arizona and California. *See* 7 U.S.C. § 608c; 7 C.F.R. §§ 907.1, 908.1, 910.1 (1994). Citrus handlers who ship oranges and lemons in excess of their allotment ("prorate") are subject to criminal fines and civil penalties. *See* 7 U.S.C. §§ 608a(5), 608c(14).

The qui tam relators alleged that the defendants had, over the course of approximately ten years, violated the prorate provisions of the orange and lemon marketing orders by over-shipping citrus and failing accurately to report, account and pay assessments for those overshipments. Prior to the expiration of the 60-day seal period, *see* 31 U.S.C. § 3730(b)(2), the government elected to intervene in 10 of the qui tam cases.

As the relators were filing their qui tam complaints, the government was also filing prorate violation claims under the AMAA against citrus industry growers and packinghouses, including Sequoia Orange Company. After discovering growing evidence of widespread prorate violations in the industry, the Secretary concluded that the prorate cheating reflected dissatisfaction with the citrus marketing orders, and that the orders had become divisive. In June 1993 the Secretary formally suspended orange and lemon prorate regulation and invited the citrus industry to propose amendments to the marketing orders.

Simultaneously, the government proposed a settlement of all AMAA and FCA cases alleging prorate violations in order

to end industry turmoil. To facilitate the settlement, the government moved to intervene in the remaining 24 qui tam cases pursuant to 31 U.S.C. § 3730(c)(3), which permits the government to intervene in a qui tam action at any time "upon a showing of good cause." The district court granted the motion, over the relators' objections, on the basis of the government's representations that it would litigate the qui tam actions, in conjunction with the AMAA cases, if a settlement could not be reached.

While the settlement negotiations were proceeding, the district court ruled in April 1994 that the 1984 orange marketing orders were unlawfully promulgated and that the prorate provisions of the orange marketing orders were therefore invalid. *See United States v. Sunny Cove Citrus Ass'n*, 854 F.Supp. 669, 697 (E.D.Cal.1994). The *Sunny Cove* case involved the government prosecution of another citrus handler, Sunny Cove, for violations of orange prorate regulations. Sunny Cove successfully defended the prosecution on the ground that the Secretary's reinstatement of prior marketing orders was invalid. That decision made settlement less likely in these qui tam cases because the overwhelming majority of qui tam and AMAA actions were based on the invalidated prorate regulations.

In May 1994, the Secretary announced his decision to terminate the citrus marketing orders, dismiss all pending AMAA actions, and withdraw from the FCA cases. The Secretary justified this decision on the failure of the settlement negotiations, the prospect of more litigation after the *Sunny Cove* decision, and the desire to end the divisiveness in the citrus industry caused by over ten years of litigation. The Secretary concluded that the best way to advance the interests of the industry was to "clean the slate."

At the time of the Secretary's announcement, the government apparently did not believe it had the authority to dismiss the qui tam actions over the relators' objections. After soliciting advice from all parties on the government's authority to dismiss under 31 U.S.C. § 3730(c)(2)(A), the government moved for dismissal in August, 1994, citing six reasons: (1) to end the divisiveness in the citrus industry; (2) to facilitate a new marketing order; (3) to terminate protracted and burdensome litigation; (4) to protect the United States' taxpayers from continuing and escalating litigation expenses; (5) to curtail the drain on private resources resulting from the litigation; and (6) to allow the growers, agricultural cooperatives, handlers and others to work together in shaping new marketing tools.

After a four-day evidentiary hearing, the district court granted the government's motion to dismiss the qui tam actions, ruling that the government sought dismissal for legitimate government purposes; that the reasons offered by the government were rationally related to these legitimate government purposes; and that the dismissal was not arbitrary or capricious. *See* 912 F.Supp. at 1353. The relators appeal, contending that the district court could not dismiss on the government's motion unless the court found the cases lacked merit.

DISCUSSION

The legal issues turn on the provisions of the False Claims Act as it was amended in 1986. Under the qui tam provisions of the FCA, a private individual, referred to as a relator, may file an action on behalf of the federal government against any individual or company who has knowingly presented a false

claim to the government for payment. *See* 31 U.S.C. §§ 3729(a), 3730(b). A successful relator will generally receive a share of the civil fines imposed and be eligible for attorneys' fees and costs. *See* 31 U.S.C. § 3730(d); *United States ex rel. Hall v. Teledyne Wah Chang Albany*, 104 F.3d 230, 233 (9th Cir.1997).

To proceed with a qui tam action, the relator must serve a copy of the complaint on the government 60 days before it is served on the defendant. *See* 31 U.S.C. § 3730(b)(2). During the 60-day period, the government can investigate the complaint's allegations and elect to intervene in the action, in which case the action is conducted by the government. 31 U.S.C. § 3730(b)(4)(A).

When the government chooses not to take over a qui tam action, the relator has the right to conduct the action. 31 U.S.C. § 3730(c)(3). However, even in cases where the government initially elects not to take over the action, the court "may nevertheless permit the Government to intervene at a later date upon a showing of good cause." 31 U.S.C. § 3730(c)(3); *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 746 (9th Cir.1993). The government may dismiss the action "notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion." 31 U.S.C. § 3730(c)(2)(A); *Kelly*, 9 F.3d at 746.

I.

Dismissal of a Qui Tam Action

The relators' primary contention is that the district court erred by interpreting 31 U.S.C. § 3730(c)(2)(A) to allow the

government to dismiss a meritorious qui tam action. The government conceded, for purposes of its motion to dismiss, that the FCA claims against the defendants were meritorious. The issue is one of statutory interpretation which we review de novo. *See United States ex rel. Lujan v. Hughes Aircraft Co.*, 67 F.3d 242, 245 (9th Cir.1995).

Although the statute is silent regarding the circumstances under which the government may dismiss a qui tam action, the decision to dismiss has been likened to a matter within the government's prosecutorial discretion in enforcing federal laws. *See Kelly*, 9 F.3d at 756 (rejecting qui tam defendant's contention that 31 U.S.C. § 3730(c)(2)(A) impermissibly grants the judiciary approval authority over government decisions to dismiss qui tam suits in the exercise of its prosecutorial authority); *see also United States ex rel. Killingsworth v. Northrop Corp.*, 25 F.3d 715, 724 (9th Cir.1994) ("The Court will not assume that the qui tam provisions of the False Claims Act were intended to curtail the prosecutorial discretion of the Attorney General.") (quoting *Juliano v. Federal Asset Disposition Ass'n*, 736 F.Supp. 348, 351 (D.D.C.1990), *aff'd*, 959 F.2d 1101 (D.C.Cir.1992)).

The relators argue that interpreting 31 U.S.C. § 3730(c)(2)(A) to give the government authority to dismiss a meritorious qui tam action is inconsistent with the general framework of the False Claims Amendments Act of 1986, Pub.L. No. 99-562, 100 Stat. 3154, which was intended to provide relators with "increased involvement in suits brought by the relator but litigated by the Government." S.Rep. No. 99-345, at 13 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5278; *see also Kelly*, 9 F.3d at 745 ("Congress amended the FCA in 1986 to . . . enlist the aid of the citizenry in combatting

the rising problem of 'sophisticated and widespread fraud.' ") (citation omitted).

Before the 1986 amendments, when the government elected to intervene in a qui tam action, the suit was conducted solely by the government. The 1986 amendments allow the relator to continue as a party to the action after the government's intervention. *See* 31 U.S.C. § 3730(c)(1). Although the amendments increased the relator's role in such a case, the government still has "primary responsibility" for the case and now enjoys supervisory powers over the relator. *Id.* The government can limit the relator's participation by restricting the number of the relator's witnesses or the length of their testimony. *See* 31 U.S.C. § 3730(c)(2)(C). The government may also stay the relator's discovery requests if they are likely to interfere with the government's criminal or civil investigation of related matters. *See* 31 U.S.C. § 3730(c)(4). The amended statute allows the government to settle an action, notwithstanding the objections of the relator, as long as the court determines that the proposed settlement is fair. *See* 31 U.S.C. § 3730(c)(2)(B). Most relevant to the present suit, the government has the right to dismiss the action, notwithstanding the relator's objection, if the relator is afforded notice and a hearing. *See* 31 U.S.C. § 3730(c)(2)(A).

The 1986 amendments have also expanded the government's ability to intervene in a qui tam action. The government may move for an extension of the original 60-day period for deciding whether to intervene. *See* 31 U.S.C. § 3730(b)(3). Even after that period has expired, the government now has the right to track the litigation and to intervene at a later date upon a showing of good cause. *See* 31 U.S.C. § 3730(c)(3).

Thus, while we have observed that the False Claims Amendments Act of 1986 provided "increase[d] incentives, financial and otherwise, for private individuals to bring suits on behalf of the Government," *Killingsworth*, 25 F.3d at 721, the Act actually increased, rather than decreased, executive control over qui tam lawsuits. This has been accomplished by broadening the government's powers of intervention, and by giving the government the ability to supervise the relator's participation in a qui tam action when the government elects to intervene. Certain of the government's supervisory powers, such as the power to stay the relator's discovery, apply even if the government decides not to intervene. As one court has concluded, "[t]he 1986 version of the False Claims Act continues the evolution of greater executive control over qui tam lawsuits." *See United States ex rel. Stillwell v. Hughes Helicopters, Inc.*, 714 F.Supp. 1084, 1090 (C.D.Cal.1989).

Although the amendments give the relator the right to remain a party after government intervention, the government's power to dismiss or settle an action is broad. The amended statute grants the relators an opportunity for a hearing on the motion to dismiss, but does not specify any conditions under which the relator may block the motion. This court has previously noted that "[i]t is not clear whether in practice this notice and hearing requirement has amounted to much of a hurdle for the government." *Kelly*, 9 F.3d at 753 n. 11.

The relators point to the statement in *Kelly* that 31 U.S.C. § 3730(c)(2)(A) allows the government to "move for dismissal of a case which it believes has no merit." *See id.* at 753. They suggest that this statement means that lack of merit is the exclusive ground upon which the government may seek dismissal. *Kelly* does not so hold.

Appendix A

The legislative history of the 1986 Amendments supports the district court's conclusion that a meritorious suit may be dismissed upon a proper showing. The Senate Report states that the False Claims Amendments Act of 1986 "provides qui tam plaintiffs with a more direct role . . . in acting as a check that the Government does not neglect evidence, cause undue delay, or drop the false claims case without legitimate reason." S.Rep. No. 99-345, at 25-26 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5291. This statement reflects congressional intent that the qui tam statute create only a limited check on prosecutorial discretion to ensure suits are not dropped without legitimate governmental purpose.

The relators next contend that even if the government could have dismissed the cases had it intervened initially, it could not move for dismissal after it later intervened for good cause pursuant to 31 U.S.C. § 3730(c)(3). We rejected a similar contention in *Kelly*: "[W]hen the government intervenes late in the action, a fair interpretation of the statute is that the government has a similar degree of control over the litigation as if it had intervened at the start." *Kelly*, 9 F.3d at 752. Nothing in § 3730(c)(2)(A) purports to limit the government's dismissal authority based upon the manner of intervention. This court has noted that § 3730(c)(2)(A) may permit the government to dismiss a qui tam action without actually intervening in the case at all. *See Kelly*, 9 F.3d at 753 n. 10 (*citing Juliano v. Federal Asset Disposition Ass'n*, 736 F.Supp. 348 (D.D.C.1990), *aff'd*, 959 F.2d 1101 (D.C.Cir.1992)).

Appendix A

II.

Standard Governing a Motion to Dismiss Under 31 U.S.C. § 3730(c)(2)(A)

The relators next challenge the district court's choice of standard governing dismissal under 31 U.S.C. § 3730(c)(2)(A). The relators contend that, if the government does have the authority to dismiss a meritorious qui tam action under 31 U.S.C. § 3730(c)(2)(A), the applicable standard is Rule 41(a)(2) of the Federal Rules of Civil Procedure. That rule allows the court to grant a plaintiff's dismissal motion only with appropriate terms and conditions to protect the defendant from prejudice. In this case, because dismissal prejudiced the relators by precluding a qui tam award, the relators claim that dismissal should not have been permitted.

Rule 41 protects defendants from vexatious plaintiffs. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 397, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990). In this case, the plaintiffs, or relators, seek protection from the dismissal decision of the real party in interest, the government, under a specific statute establishing unique relationships among the parties. The district court correctly ruled that Rule 41 did not apply.

The qui tam statute itself does not create a particular standard for dismissal. The district court acted reasonably in adopting the following standard: "A two step analysis applies here to test the justification for dismissal: (1) identification of a valid government purpose; and (2) a rational relation between dismissal and accomplishment of the purpose." 912 F.Supp. at 1341. If the government satisfies the two-step test, the burden

switches to the relator "to demonstrate that dismissal is fraudulent, arbitrary and capricious, or illegal." *Id.* at 1347. The same analysis is applied to determine whether executive action violates substantive due process. *See e.g., Lockary v. Kayfetz*, 917 F.2d 1150, 1155 (9th Cir.1990).

This standard also draws significant support from the Senate Report to the False Claims Amendments Act of 1986, which explained that the relators may object if the government moves to dismiss without reason. S.Rep. No. 99-345, at 26 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5291. A hearing is appropriate "if the relator presents a colorable claim that the settlement or dismissal is unreasonable in light of existing evidence, that the Government has not fully investigated the allegations, or that the Government's decision was based on arbitrary or improper considerations." *Id.*

Moreover, such a rational relation test avoids any separation of powers concerns that this court addressed in *Kelly*. There, we rejected a qui tam defendant's contention that 31 U.S.C. § 3730(c)(2)(A) impermissibly grants the judiciary approval authority over government decisions to dismiss qui tam suits in the exercise of its prosecutorial authority. *See United States ex rel. Kelly*, 9 F.3d at 756. We said:

> We conclude that the judicial involvement which the FCA authorizes does not contravene the separation of powers principle. First, in the absence of any meaningful indication that [the notice and hearing] requirements pose significant barriers to the Executive Branch's exercise of its prosecutorial authority, we see no reason to construe them as such and thereby heighten constitutional concerns. See

note 8. Second, as we noted earlier, ample precedent exists for judicial oversight of the government's decision to dismiss a qui tam action. See note 12.

Id.

Here, the district court has respected the Executive Branch's prosecutorial authority by requiring no greater justification of the dismissal motion than is mandated by the Constitution itself. *See United States v. Redondo-Lemos*, 955 F.2d 1296, 1298-99 (9th Cir.1992) (due process prohibits arbitrary or irrational prosecutorial decisions).

III.

Application of the Rational Relation Standard

The relators contend that the district court misapplied the rational relation standard and that the reasons offered by the government for dismissal were not rationally related to a legitimate government interest. We conclude that the government met its burden.

The relators first argue that elimination of legal battles in the citrus industry is not a legitimate government interest under the AMAA. The statute directs the Secretary to oversee orderly marketing processes. *See* 7 U.S.C. § 602(1). Peace among competitors and regulators facilitates orderly marketing. This is especially true under a statute, which as the Supreme Court has noted, "contemplates a *cooperative* venture among the Secretary, handlers, and producers." *Block v. Community Nutrition Inst.*, 467 U.S. 340, 346, 104 S.Ct. 2450, 81 L.Ed.2d 270 (1984) (emphasis added).

The relators next assert that the government's dismissal motion was based on improper factors, such as political pressure from the defendants and members of Congress. However, as noted by the district court, citizens are entitled to advocate the passage or enforcement of laws, *see, e.g., Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 139, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961) ("It is neither unusual nor illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors."), and members of Congress may seek to influence agency action, *see, e.g., Radio Ass'n on Defending Airwave Rights, Inc. v. United States Dep't of Transp.*, 47 F.3d 794, 808 (6th Cir.1995) ("Americans rightly expect their elected representatives to voice their grievances and preferences concerning the administration of our laws."). There was no evidence that the defendants engaged in bribery, fraud, or coercion, or otherwise conspired with the government to dismiss the qui tam actions for improper reasons.

Third, the relators contend that the government sought dismissal because Sequoia Orange Company itself was a prorate cheater. The record shows, however, that the government deemed further FCA litigation over prorate violations harmful to the industry as a whole. Dismissal enabled the government to treat all alleged prorate violators equally by dismissing all enforcement actions, including the Secretary's AMAA enforcement action against Sequoia.

Next, the relators contend that the government's concern with litigation costs was irrelevant in light of the fact that the FCA contemplates reliance on private financing for anti-fraud enforcement. The district court, however, properly noted that the government can legitimately consider the burden imposed

on the taxpayers by its litigation, and that, even if the relators were to litigate the FCA claims, the government would continue to incur enormous internal staff costs. *See* 912 F.Supp. at 1346.

The relators finally contend that the district court erred by granting the government's motion to dismiss the qui tam actions relating to lemon marketing because the lemon order, unlike the orange order, had not been invalidated by the *Sunny Cove* decision. The government presented evidence that (1) various lemon handlers were under investigation for prorate violations and (2) the lemon prorate violations were comparable to prorate cheating in the orange industry and potentially as pervasive. The dismissal of the lemon cases was therefore rationally related to the legitimate government interest in preserving the financial stability of the lemon industry.

IV.

Judicial Estoppel

The relators contend that the doctrine of judicial estoppel bars the government from dismissing the qui tam actions in light of the government's earlier declarations, in support of its motion to intervene in the orange qui tam actions, that it would diligently prosecute the FCA claims. The doctrine of judicial estoppel is an equitable doctrine invoked by the district court at its discretion. *See Morris v. California*, 966 F.2d 448, 453 (9th Cir.1992). This court reviews for an abuse of discretion. *See United States v. Ruiz*, 73 F.3d 949, 953 (9th Cir.1996).

Judicial estoppel bars a party from taking inconsistent positions in the same litigation. *See Morris*, 966 F.2d at 452. In support of its motion to intervene in the qui tam actions, the

government represented to the district court that it would litigate the FCA claims if no settlement was reached. The relators contend that this representation is inconsistent with the government's later decision to dismiss. In moving to dismiss, however, the government was motivated by events that transpired after its intervention, most notably the decision in *Sunny Cove*, which declared the orange marketing orders invalid. There is no indication that the government acted in bad faith by representing that it would litigate the FCA claims if settlement negotiations fell through. *See Helfand v. Gerson*, 105 F.3d 530, 534 (9th Cir.1997). Rather, the government changed course when it determined that settlement was no longer a reasonable possibility after Sunny Cove. This was a rational policy decision that the government was entitled to make under the qui tam provisions. Accordingly, the district court did not abuse its discretion in concluding that there was no equitable reason to apply judicial estoppel.

V.

Amendment of Qui Tam Complaints

This court reviews for an abuse of discretion the district court's denial of a motion for leave to amend a complaint. *See United States v. County of San Diego*, 53 F.3d 965, 969 n. 6 (9th Cir.1995).

After the district court granted the government's motion to dismiss the qui tam actions, the relators informally requested leave to file amended complaints alleging non-FCA claims. The court denied the relators' request on the ground that they had failed to provide reasonable notice and an opportunity for hearing on the request, in violation of Rule 15 of the Federal

Rules of Civil Procedure and the Local Rules of the Eastern District of California. Given the extremely late date at which the relators first requested leave to amend, the district court did not abuse its discretion in denying the request. *See* Fed.R.Civ.P. 15(a); *Moore v. Kayport Package Express*, 885 F.2d 531, 538 (9th Cir.1989) (court may consider delay and prejudice when ruling on motion for leave to amend).

CONCLUSION

We conclude that 31 U.S.C. § 3730(c)(2)(A) permits the government to dismiss a meritorious qui tam action over a relator's objections. Where, as here, the government offers reasons for dismissal that are rationally related to a legitimate government interest, the qui tam action may be dismissed.

AFFIRMED.

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA, RE: UNITED STATES' MOTION TO DISMISS FILED SEPTEMBER 27, 1995

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CV-F-88-566-OWW

UNITED STATES ex rel. SEQUOIA ORANGE COMPANY,

Plaintiff,

v.

SUNLAND PACKING HOUSE COMPANY,

Defendants.

CV-F-89-002
Consolidated with

CV-F-89-004
CV-F-89-006
CV-F-89-007
CV-F-89-008
CV-F-89-012
CV-F-89-013
CV-F-89-014

UNITED STATES ex rel. SEQUOIA ORANGE COMPANY,

Plaintiff,

v.

Appendix B

SAN JOAQUIN CITRUS, and SUNKIST GROWERS, INC.,

Defendants.

CV-F-89-050
Consolidated with
CV-F-89-051
CV-F-89-052
CV-F-89-053
CV-F-89-054
CV-P-89-055
CV-F-89-056
CV-F-89-057
CV-F-89-058
CV-F-89-059
CV-F-89-060
CV-F-89-061
CV-F-89-062

UNITED STATES ex rel. SEQUOIA ORANGE COMPANY,

Plaintiff,

v.

BAIRD-NEECE PACKING CORP., and SUNKIST GROWERS, INC.,

Defendants.

Appendix B

CV-F-91-194-OWW

UNITED STATES ex rel. SEQUOIA ORANGE COMPANY,

Plaintiff,

v.

OXNARD LEMON COMPANY, et al.,

Defendants.

CV-F-91-195

UNITED STATES ex rel. SEQUOIA ORANGE COMPANY,

Plaintiff,

v.

MISSION CITRUS COMPANY, et al.,

Defendants.

CV-F-91-196

UNITED STATES ex rel. SEQUOIA ORANGE COMPANY,

Plaintiff,

v.

VENTURA PACIFIC COMPANY, et al.,

Defendants.

Appendix B

CV-F-91-197

UNITED STATES ex rel. SEQUOIA ORANGE COMPANY.,

Plaintiff,

v.

SATICOY LEMON ASSOCIATION, et al.,

Defendants.

CV-F-93-5016-OWW

UNITED STATES ex rel. LISLE BABCOCK,

Plaintiff,

v.

DOLE CITRUS, INC.,

Defendant.

MEMORANDUM OPINION & ORDER
RE: UNITED STATES' MOTION TO DISMISS

I. BACKGROUND

These 27 partially consolidated False Claims Act (FCA) cases are before the court on the United States's motion to

dismiss under 31 U.S.C. § 3730(a)(2)(A).[1] The motion presents a question of first impression.

A. Statutory Background.

The claims arise from alleged violation of prorate restrictions and reporting requirements in navel and valencia orange marketing orders (7 C.F.R. §§ 907 and 908)[2] and the lemon marketing order (7 C.F.R. § 910). The relators, Sequoia Orange Company, a handler (processor) and, Lisle Babcock, a grower of oranges, are competitors of defendants. Defendants are Sunkist Growers, Inc., an agricultural cooperative corporation and packinghouses, most of whom are Sunkist affiliates. Relators contend that despite the defendants' support for marketing orders, defendants for some ten years have consistently violated prorate and other regulations of the orders by overshipping oranges and failing to accurately report, account, and pay assessments for those overshipments which give rise to the asserted false claims. A bitter ideologic dispute over citrus industry regulations between relators and defendants has continued for more than ten years.

For the purposes of the motion, the parties assume the merit of the FCA claims, subject to the United States' objection to subject matter jurisdiction that FCA claims based on alleged

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1. The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the Court has provided the person with an opportunity for hearing on the motion."

2. All citations to the Code of Federal Regulations refer to the 1994 edition. The regulations pertaining to the citrus marketing orders do not appear in the 1995 edition because the orders were terminated in 1994.

violations of the Agricultural Marketing Agreement Act (AMAA) implicate a regulatory fine that cannot support a claim as a matter of law.[3] Relators have prosecuted these lawsuits and relentlessly waged a campaign of public criticism against Sunkist and its members, alleged economic domination of the industry, claimed to have been effectuated primarily through government regulation under the AMAA. To decide the dismissal motion, the long and complex history of disputes over Marketing Orders in the California-Arizona citrus industry must be analyzed.

The parties disagree on whether the applicable standard for decision is: (1) an unreviewable prosecutorial discretion standard; (2) a rational relation standard; or (3) a Federal Rule of Civil Procedure Rule 41(a) non-prejudice standard.

1. The Agricultural Marketing Agreement Act of 1937.

The underlying law requires us to "delve into one of the more byzantine, and all-encompassing, areas of federal administrative regulation — that governing fruits and vegetables." *Wileman Bros. Elliot, Inc. v. Espy*, 58 F.3d 1367, 1372 (9th Cir. 1995). The Agricultural Marketing Agreement Act of 1937 (AMAA) was enacted "to establish and maintain . . . orderly marketing conditions for agricultural commodities in interstate commerce." 7 U.S.C. § 602(1). Congress believed that improved marketing conditions for agricultural products would benefit both producers and consumers by ensuring "an

3. This apparent inconsistency is explained by reference to the history of the government's initial declination to take over the cases after denial of its motion to dismiss for failure to state a claim, and later intervention to "settle the cases." 31 U.S.C. §§ 3730(c)(2)(B) and (c)(3).

orderly flow of the supply [of fruits and vegetables] to market throughout [their] normal marketing season to avoid unreasonable fluctuations in supplies and prices." 7 U.S.C. § 601(4). "The Act contemplates a cooperative venture among the Secretary, handlers, and producers the principal purposes of which are to raise the price of agricultural products and to establish an orderly system for marketing them." *Block v. Community Nutrition Inst.*, 467 U.S. 340, 346 (1984).

To achieve these goals the AMAA provides the Secretary and the industry with a powerful tool, the marketing order. Through marketing orders the Secretary and the industry may regulate, *inter alia*, the quality, size, and quantity of a particular commodity shipped to market. Marketing orders are essentially self-help mechanisms to advance the economic interests of the industry. The Secretary is not required to promulgate marketing orders in each fruit or vegetable industry that is eligible under the AMAA. Clayton 107:7-10.[4] The Secretary generally does not advocate marketing orders in unregulated industries unless industry participants request assistance in obtaining an order.[5] Clayton, at 110.

Marketing orders become effective upon approval by the Secretary and the industry. When the Secretary believes a proposed order will tend to effectuate the declared policy of the AMAA, the industry must be provided notice and an opportunity for a hearing on the proposed order. 7 U.S.C. § 608c(3),(4). If after the hearing the Secretary issues an order

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4. Testimony given during the evidentiary hearing is referenced by the last name of the witness and the relevant transcript page.

5. Nonetheless, "a marketing order may be proposed *by the Secretary* or by any other person." 7 C.F.R. § 900.3 (emphasis added).

finding that the proposed order will effectuate AMAA policies then an industry referendum is conducted. In the citrus industry marketing orders must be approved by (1) handlers marketing eighty percent of the volume of the commodity and (2) either three-quarters of the affected growers or by growers who market at least two-thirds of the volume of the particular commodity (navels, valencias, or lemons). 7 U.S.C. § 608c(8). The Secretary may waive the necessity for handier support by finding that handler refusal to sign the agreement tends to prevent the effectuation of the AMAA. 7 U.S.C. § 608c(9); *see also United States v. Sunny Cove Citrus Ass'n,* 854 F. Supp. 669, 676 (E.D. Cal. 1994).

Once effective, marketing orders are implemented by committees composed of industry members. 7 U.S.C. §§ 608c(7)(C), 610. Committee members are nominated by industry groups, appointed by the Secretary, and supervised by the Agricultural Marketing Service (AMS), an agency within the United States Department of Agriculture (USDA). *See, e.g.,* 7 C.F.R. §§ 907.22, 907.23. The committees recommend rules and regulations to effectuate the marketing orders, to govern matters such as fruit quality and flow to market restrictions, which the Secretary may adopt through informal rulemaking. 7 C.F.R. § 907.52-52, 907.64.

The expenses to administer the marketing orders are funded through assessments imposed upon fruit handlers based on the volume of fruit they ship. 7 U.S. C. § 610 (b) (2) (ii) . The committees *annually* submit budgets and a recommendation for the rate of assessment to the Secretary. 7 C.F.R. § 907.41. The Secretary approves the conmittees' budgets and the assessments to be imposed on handlers each year in the form of a regulation.

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Marketing orders have regulated the California-Arizona orange industry since 1954. *Cecilia Packing,* 10 F.3d 616, 618 (9th Cir. 1993). Each citrus order contained prorate provisions, which limited the weekly volume of fruit shipped to market. The efficacy of prorate has been bitterly disputed by industry members, particularly Sequoia.

Defendant Sunkist is an agricultural cooperative corporation, a protected form of entity under the AMAA. It has affiliated packinghouses and member growers. Through bloc-voting,[6] Sunkist allegedly perpetuated prorate, while many independent growers and packinghouses, as well as some Sunkist members, opposed prorate and other forms of federal regulation of the industry. Relators have for over ten years claimed that defendants, particularly Sunkist, exercise enhanced access to and influence over the USDA and members of Congress, by virtue of defendants' political influence, lobbying efforts, and campaign contributions to elected officials. These efforts allegedly resulted in the adoption of marketing orders with prorate and appointment of defendants and their supporters to industry AMAA commodity (navel and valencia orange) committees (NOAC and VOAC).

Under prorate, the commodity committees meet each week during the harvest season to recommend a total quantity of

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6. The AMAA provides that whenever the Secretary conducts a referendum on grower support for a marketing order "the Secretary shall consider the approval or disapproval by any cooperative association of producers . . . as the approval or disapproval of the producers who are members of, stockholders in, or under contract with, such cooperative association." 7 C.F.R. 608c(12); *see also Cecilia Packing,* 10 F.3d 616, 621-25 (9th Cir. 1993) (the bloc-voting provision does not infringe First-Amendment freedoms or violate equal protection).

oranges and lemons for shipment to market the following week. 7 C.F.R. §§ 907.51, 908.51, 910.51. Producers pay assessments to the committees based on the volume of fruit shipped to market. 7 C.F.R. §§ 907.41, 908.41, 910.41. Handlers who ship quantities of citrus in excess of their allocated prorate are subject to criminal fines of up to $5,000 per violation and civil penalties of $1,000 per violation. 7 U.S.C. § 608c(14). They are also subject to civil forfeitures for quantities of fruit shipped in excess of prorate. The amount of the forfeiture is "a sum equal to the value of such excess at the current market price for such commodity at the time of violation." 7 U.S.C. § 608a(7). The United States is authorized to initiate criminal prosecutions and forfeiture suits against handlers who violate prorate. 7 U.S.C. § 608a(7). The most onerous result of prorate is the dumping of fruit required when supply exceeds available prorate quotas.

2. The False Claims Act.

The FCA creates liability for those who defraud the government. One species of fraud claim under the FCA, the so-called "reverse false claim," makes liable any person who "knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government." 31 U.S.C. § 3729(a)(7). The penalty for violation of the FCA is a fine of not less than $5,000 and not more than $10,000 per false report plus three times the amount of damages the government sustains as a result of the fraud. 31 U.S.C. § 3729(a).

The FCA includes provisions to encourage "whistleblowing" by private individuals with knowledge of

fraud on the government. Under these *qui tam* provisions, a private party, called a relator, may initiate a suit under the FCA in the name of the federal government. 31 U.S.C. § 3730(b). However, the complaint must be filed under seal for 60 days before it is served on the defendant. During this time the *government* can elect to intervene in the action or decline to take over the action. Id. In the latter case, the relator may proceed with the case. 31 U.S.C. § 3730(c)(1). if the government ultimately obtains a recovery the relator is entitled to a percentage of the proceeds, which depends upon the relator's involvement in the case, as well as reasonable costs and attorneys' fees. 31 U.S.C. § 3730(d).

In these FCA cases, relators allege the defendants created false reports and documents to conceal fruit shipments in excess of their prorate allotment and intentionally avoided payment of assessments for unreported overshipments and forfeitures payable for undocumented shipments.[7] The government has steadfastly maintained no claim can be stated under the FCA for violation of AMAA prorate regulations.[8] Originally the government prosecuted Sequoia and other orange growers and handlers for alleged AMAA violations and sought to deny Sequoia's participation as relator in these cases.

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7. The relators contend the defendants concealed excess shipments by two methods. The first method was to not record shipments in excess of the prorate allotment for a particular week. The second method, sometimes called "mismanifesting", was to falsely record the date of a shipment. Fruit shipped during weeks in which the packinghouse did not have sufficient prorate was mismanifested to appear that it was shipped during a different week.

8. Statements by the government's trial counsel concerning the intention of the United States as plaintiff to prosecute these FCA cases are the subject of dispute.

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Under the citrus marketing orders, handlers are required to complete and submit reporting documents to the commodity committee when shipping fruit. They must provide daily (form 3) and weekly (form 4) reports of fruit shipped. See, e.g., 7 C.F.R. §§ 908.140 and 908.141. They must also complete an assignment of allotment certificate (form 8). E.g. 7 C.F.R. § 908.58. Finally, the marketing orders require handlers to keep other records such as truck manifests and customer invoices. E.g. 7 C.F.R. § 908.173. Relators allege that a mismanifested shipment of fruit could result in as many as five false records, forms 3, 4, and 8, plus a shipping manifest and a customer invoice. At a minimum, an unrecorded shipment results in two false records, forms 3 and 4. The loss to the government is claimed to be unpaid assessments calculated on unreported volume of overshipped fruit, 7 U.S.C. § 610(b)(2)(ii), and the AMAA forfeiture (market value of the excess fruit). Relators also seek penalties of up to $10,000 for each false record made in connection with a prorate violation and three times the market value of the fruit shipped in excess of prorate. Total claims are estimated to approach four hundred million dollars.

B. History of the Litigation.

Sequoia, an independent packinghouse that competes with defendants in the citrus industry, has been accused of shipping oranges in excess of its prorate allotment in a 1993 AMAA forfeiture action brought by the government. Sequoia was sanctioned in that litigation for intentional document destruction in violation of court order. Although Sequoia is a vehement critic and opponent of the California-Arizona citrus marketing orders, particularly the prorate feature, Sequoia denies it cheated on prorate. It complains that the USDA ignored widespread cheating by other members of the industry, particularly Sunkist,

the dominant co-op in the California-Arizona citrus industry, and its associated packinghouses and members, Sequoia counterclaimed against the USDA charging it was being selectively prosecuted for its opposition to the marketing orders. The counterclaim was dismissed on the ground that the government is not barred from selectively prosecuting prorate cheaters in its exercise of prosecutorial discretion. *See United States v. Sequoia,* CV-F-83-510, order filed March 14, 1994.

In December of 1988 Sequoia filed the first of these FCA cases alleging violation of the navel and valencia orange marketing orders. In 1989 it filed 22 more orange cases naming Sunkist and Sunkist-affiliated packinghouses. The government moved to dismiss those cases, arguing no FCA claim could be stated for false statements made in connection with AMAA prorate regulations. The government's motion was denied on July 5, 1989. The government elected not to intervene in the cases.

In 1991, Sequoia filed four additional FCA cases alleging violations of the lemon marketing order. The government again moved to dismiss the cases for failure to state a claim. The motion was denied by a different judge. Unlike the orange cases, the government elected to intervene in the lemon cases. The last FCA case was filed in 1993 by Lisle Babcock, an orange grower, against Dole Citrus, although Sequoia has nine additional cases.

The government conducted its own investigations into alleged prorate violations between 1989 and 1991. It began filing AMAA cases based upon the evidence it uncovered. In June of 1993 the government decided to seek a "global" settlement of all AMAA and FCA cases alleging prorate

violations too end industry turmoil. To facilitate FCA settlements the government moved to intervene in the orange cases. The relators opposed the government's motion to intervene, claiming intervention would lead to a "sweetheart" settlement, that the government would not vigorously pursue the cases by reason of its opposition to use the FCA for AMAA enforcement, and because the USDA was under the alleged political influence of Sunkist and other of the packinghouse defendants. At an August 9, 1993, hearing on the government's intervention motion, the government's trial counsel, in response to specific inquiry from the court whether it would prosecute the FCA claims if the cases were not settled, stated that the government intended to litigate the FCA claims if necessary. (Trans. pp. at 22-24). A high level of mistrust and hostility, actual and legal, has existed between relators and the *government* from the inception of these cases.

The government's motion to intervene was granted based upon its trial counsel's representation that it would pursue the FCA claims if no settlement was reached.[9] Settlement procedures were then established which required that relators be allowed to object to any settlement of the FCA cases. However, based upon allegations that relators were using the cases to destroy the businesses of the defendants and to create sufficient disruption in the industry to facilitate the demise of

9. In the evidentiary hearing on these motions testimony revealed for the first time, that the USDA never intended to litigate the FCA cases; its only purpose for intervention in the cases was to settle them. Rominger, at 214, 261; Golden, at 634. Intervention was ordered over relators, objection that they had a nondefeasible vested interest in these *qui tam* cases. See Mem. Op. & Order re U.S. Mot. to Dismiss, at 14-15. Relators' right to share in the FCA bounty is subject to defeasance if the government moves to dismiss or settle the case over the relators, objection. 31 U.S C.§ 3 730 (c)(2)(A), (2)(B).

prorate and marketing orders, relators were not allowed to participate directly in settlement negotiations. 31 U.S.C. § 3730(c)(2)(C) and (D). The defendants and the government believed that confidential financial and transactional information about the defendants, to be provided during the settlement process, could be used by the relators to the detriment of-the defendants, to harass them in existing FCA cases and to obtain facts to support new FCA cases. The defendants opposed disclosing confidential operating data and evidence of their financial condition. See 7 U.S.C. § 608d. However, court-ordered settlement procedures required that the government disclose terms of any settlement reached by it with the defendants to allow the relators the opportunity to exercise their right to object to any settlement under 31 U.S.C. 3730(c)(2)(B).

In June of 1993 the USDA suspended the prorate feature of the citrus marketing orders. It requested that members of the industry propose amendments to the current marketing orders. Although some proposals were submitted to the Secretary, he concluded that none of them had sufficient support within the industry to justify a hearing.

On April 18, 1994, this court issued a ruling a summary judgment motions in *United States v. Sunny Cove Citrus Ass'n,* 854 F. Supp. 69 (E.D. Cal. 1994), which held the 1984 navel and valencia orange marketing orders, Nos. 907 and 908, were unlawfully promulgated. The *Sunny Cove* decision was the final chapter of a controversy that began in July of 1984 when the Secretary of Agriculture proposed 21 amendments to the orange marketing orders. 49 Fed. Reg. 19,071 (1984). The Secretary issued a finding that all 21 amendments tended to effectuate the policies of the AMAA and that the existing orders did not.

Sunny Cove, 854 F. Supp. at 681. Initially, the Secretary required that the industry vote on the amendments as a package. If the package was defeated in the referendum then the existing orange marketing orders would be terminated and the industry would go unregulated. *Id.* After intense lobbying by Sunkist in Congress[10] and of the USDA, the Secretary reversed his decision and allowed growers to vote on each amendment separately. 49 Fed. Reg. 32,080 (1984); see also *Sequoia Orange Co. v. Yeutter*, 973 F.2d 752, 754, 757-58 & n.5 (9th Cir. 1992).[11] Only 13 of the amendments were ratified in the referendum. The Secretary issued a new finding, made without notice or opportunity for comment, that the newly amended orange marketing orders tended to effectuate the policy of the AMAA. Sunny Cove, 854 F. Supp. at 681.

Sequoia filed a petition challenging the validity of the valencia orange order. Judge Price invalidated the valencia order, because the Secretary did not follow the requirements of the Administrative Procedure Act (APA) when he reversed the finding that the orders did not tend to effectuate AMAA policy absent all 21 amendments without notice or comment.

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10. In response to pressure from those opposing the all or nothing approach to the amendments, Congress attached riders to two agricultural appropriation bills, making the funds contingent upon the Secretary allowing growers to vote on each amendment separately. *See* Act of August 22, 1984, Pub.L. No. 98-396, 1984 U.S.C.C.A.N. (98 Stat.) 1369; Act of October 12, 1584, Pub.L. No. 98-473, 1984 U.S.C.C.A.N. (98 Stat.) 1837.

11. The Ninth Circuit noted that the declaration of then Deputy Secretary of Agriculture John Ford stated, "the Secretary was in effect politically blackmailed into abruptly and without rational reason or legal justification changing the Final Decision." *Sequoia-Orange Co. v. Yeutter*, 973 F.2d at 758 n.5.

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The Ninth Circuit affirmed in *Sequoia Orange Co. v. Yeutter,* 973 F.2d at 759. Both the Appeals and trial courts afforded the Secretary opportunity to cure any deficiencies in the orders. After the Ninth Circuit decision, the Secretary announced, again without notice or opportunity for comment, that the pre-amendment orders promoted AMAA policy and would remain in effect. Sunny Cove Citrus Association sued, in 1991, challenging the validity of the pre-amendment orders.

The *Sunny Cove* decision held that the Secretary was bound by the implicit tendency finding that the unamended orders did not effectuate the AMAA without adoption of all 21 proposed amendments. The Secretary was ordered to comply with the APA's notice and comment requirements before changing this negative tendency finding. *Sunny Cove* found that the pre-amendment orders were not terminated and gave the Secretary a third opportunity to address defects in the orders that resulted from the Secretary's 1984 tendency finding.

On May 16, 1994, the USDA announced its decision to terminate all three California-Arizona citrus marketing orders, 59 Fed. Reg. 44020 (Aug. 26, 1994), dismiss all pending AMAA enforcement actions, and withdraw from the FCA cases. The USDA's justification was to end the divisiveness in the citrus industry caused by over ten years of acrimonious litigation. *See* Ex. G-15 (USDA press release, May 16, 1994). No one disputes that the citrus industry was rife with strident disputes among independents, led by relators on one side, and Sunkist and its members, over continuance of prorate and the disputed marketing orders.

After the May 16, 1994, decision, defendants intensely lobbied Congressional representatives and USDA officials to

dismiss the FCA cases. The USDA requested that the U.S. Department of Justice (DOJ) move to dismiss the FCA cases. The DOJ studied the request and then invited all of the parties to present their views. After reviewing legal briefs and written arguments from the relators[12] and the defendants, Exs. G-30 to G-32, the government moved for dismissal of the FCA cases in August of 1994. Following briefing, and oral argument on the motion to dismiss on October 24, 1994, an evidentiary hearing was ordered.

C. The Evidentiary Hearing.

A four-day evidentiary hearing was conducted in June of 1995. All of the parties were afforded the opportunity to present evidence and cross-examine witnesses. The parties also submitted deposition testimony, documentary evidence, and posthearing legal memoranda. The following additional facts were adduced.

In 1988 the USDA received complaints from Sequoia and Jack Stetson, a former NOAC and VOAC auditor of citrus marketing order compliance, of widespread prorate violations.[13] Mr. Stetson charged that prorate violations by Sunkist packinghouses were swept under the rug by corrupt committee members who represented Sunkist and committee auditors. Dave Lewis, the Director of the Office of Compliance for the

12. The realtors also met with Charles J. Stevens, the United States Attorney for the Eastern District of California, on June 14, 1984, to express their view that the government should prosecute the FCA cases rather than dismiss them. Ex. G-33.

13. The evidence established that Sequoia, through counsel, has over ten years been waging political, public relations, and litigation campaigns seeking to overturn the orange marketing orders and prorate.

AMS testified that Stetson's claims were carefully investigated. Lewis, at 291-93. The AMS found no evidence of discriminatory enforcement or corruption in the commodity committees. *Id.* at 293-94.

During its investigation of Mr. Stetson's claims the AMS discovered that the citrus committees were not adequately enforcing compliance with prorate: their auditors lacked expertise; audit coverage was spotty and shallow; and audit documentation insufficient. The AMS urged the committees to improve their investigative capabilities, increased its oversight of the committees' enforcement efforts, and became directly involved in investigations of possible prorate violations. Lewis, at 295-304. Subsequent roadside inspections of shipping manifests and examination of third party records uncovered evidence of systematic prorate cheating by Sunkist packinghouses and independent packinghouses. Lewis, at 306-13; Exs. G-58, G59, G-60.

Based upon the growing evidence of widespread prorate cheating throughout the industry, in 1992 the USDA initiated "Operation Fair Enforcement," in conjunction with the U.S. Attorney's Office and the Office of the Inspector General. Clayton, at 52. The AMS paid the salary of a Special Assistant United States Attorney who instituted numerous AMAA forfeiture actions against defendant packinghouses and others for alleged prorate violations.

The USDA concluded during 1992 and 1993, that the industry-wide cheating was indicative of dissatisfaction with and divisiveness over the marketing orders. There was a particularly strong difference of opinion over the need for prorate restrictions. Clayton, at 58. In December of 1992

Secretary Madigan informed the citrus industry that he would not entertain prorate recommendations from the commodity committees for the remainder of the season. Clayton, at 56. Sunkist, the strongest proponent of prorate, filed suit in U.S. District Court in Washington D.C. challenging the Secretary's decision. The Secretary's decision was judicially affirmed.

In June of 1993 the USDA announced suspension of prorate and invited the industry to propose amendments to the California Arizona citrus marketing orders. In response to the USDA's call for amendments the commodity committees held industry meetings to determine whether there was consensus for an amended order. Several proposed amendments were submitted, but considerable division in the industry existed over whether prorate should be retained and whether a generic advertising program should be implemented. Clayton, at 61.

A significant segment of the industry expressed an interest in amending the orders. Notes of NOAC and VOAC meetings show navel and valencia advisory committees made substantial efforts to build consensus around amendments to the citrus marketing orders. Exs. G-49 to G-55. In December of 1993, the NOAC and VOAC sent a joint letter to the USDA requesting assistance with the amendatory process. Ex. G-69. USDA policy makers were informed by staff who attended the industry committee meetings that the litigation pending in the industry was impeding the amendatory process. Clayton, at 135.[14]

14. Dr. Clayton could not recall specifically when or by whom he was informed that pending litigation was inhibiting the amendment process. Clayton, at 135-36. Nor could he recall any particular industry participant stating that it would not agree to a new marketing order unless the enforcement litigation was terminated. *Id.* at 134:18-25. Deputy

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The government in June 1993 proposed a global settlement package to all industry members sued for or suspected of prorate violations, whether under the AKAA or the FCA. The DOJIs trial counsel attempted to negotiate settlements in all pending AMAA and FCA cases. USDA officials concluded that counteroffers proposed by some defendants were too low. Clayton, at 156. By February of 1994, USDA officials believed the settlement process was moving very slowly and that the likelihood of settlement was remote. The USDA viewed Sunkist as culpable and that it should participate in any settlement. Rominger, at 196-97. However, Sunkist denied liability and adopted a stonewall position refusing to consider settlement.

After the April 1994 *Sunny Cove* decision invalidating orders 907 and 908, USDA officials doubted they could address the 1984 tendency finding without speculating as to the reasons for Secretary Block's decision or without considering the subsequent industry division and turmoil over the orders. Clayton, at 77-78; Rominger, at 199-200. They worried any attempt to reestablish the 1984 tendency finding would only spawn more litigation. Rominger, at 200.

The USDA concluded it could not continue to prosecute the AMAA orange forfeiture cases without curative rulemaking.

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Secretary Rominger recalled three specific occasions on which he was informed that pending litigation was hindering consensus for new amendments. He was told this by Sunkist representatives, representatives of defendant packinghouses, and Joel Nelson, president of California Citrus Mutual. Rominger, at 223:17-25; 225:17:23; 226:14-17. Robert Keeney testified that during discussions with staff and industry members he learned that the pending litigation was "weighing very heavily on the minds of the handlers and . . . the minds of the farmers." Keeney, at 367.

USDA rejected amending the AMAA cases to state FCA claims in deference to the DOJI s belief FCA claims could not be stated as a matter of law. After the *Sunny Cove* decision, defendants were unwilling to offer settlements.

USDA officials[15] reevaluated their citrus industry policies after *Sunny Cove.* Based upon failure to settle the AMAA enforcement and FCA litigation, futile attempts to achieve consensus for an amended order, and the prospect of either dismissing the AMAA cases or facing more litigation after *S Cove,* USDA decided it was no longer in the interest of the citrus industry to pursue AMAA enforcement actions. The Secretary concluded that the best way to advance the interests of the industry was to "clean the slate." This meant terminating the citrus marketing orders, dismissing the pending AMAA cases, and withdrawing from the FCA cases. USDA officials wanted to "wipe the slate clean" to the maximum extent possible. Clayton, at 82. However, USDA believed it lacked authority to dismiss the FCA cases and only sought to withdraw from the FCA cases. Clayton, at 82; Rominger, at 238; Golden, at 644-45.

The USDA's primary motivation was to end the divisiveness and lawlessness it perceived within the industry and to foster the development of new marketing orders. However, USDA officials considered several other factors, including the detrimental economic impact on the industry of the cost of defending against enforcement litigation and the potentially destructive effect of liability faced by defendants

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15. The principal officials involved in the decision were Deputy Secretary Richard Rominger, Acting Deputy Assistant Secretary Dr. Ken Clayton, Counsel to the Secretary Kim Schnoor, and Associate General Counsel John Golden. Clayton, at 80.

in the FCA litigation. Deputy Secretary Rominger was informed by staff that potential FCA liability could bankrupt some packinghouses. Rominger, at 203. No analysis of the packinghouses' litigation expenses and financial exposure based on defendants' financial capacity was performed. *Id.*; Clayton, at 170-71. The harmful financial impact of the litigation on the industry, though not a "determining factor," was a concern. Rominger, at 265.

Several other reasons were considered: "the message that would be sent to other industries with marketing orders;" Clayton, at 86; Rominger, at 202; the negative reaction of innocent handlers, who were harmed by prorate cheating, and of those handlers who cheated but previously settled with the USDA; Schnoor, at 104; Clayton, at 88; the USDA's investment in the cases; Clayton, at 85, Rominger, at 203; and the importance of enforcement to the success of marketing orders. Clayton, at 92. These factors were of lesser importance compared to the goal of achieving industry cooperation. Clayton, at 92.

Termination of the 1984 marketing orders did not affect the USDA's pending AMAA case against Sequoia, because those claims arose out of violations of orders in effect prior to 1984. However, consistent with global amnesty, USDA dismissed the case against Sequoia, although the government viewed Sequoia as the most culpable prorate cheater.[16]

Sunkist representatives met with Deputy Secretary Rominger the morning the USDA announced termination of

16. The government excluded Sequoia from the global settlement offer because it believed that Sequoia's conduct was more "egregious" than that of other prorate cheaters. Clayton at 185-86.

the marketing orders and the AMAA cases. When told the government would not dismiss the FCA cases, Sunkist requested a second meeting with Deputy Secretary Rominger. At that meeting they told him they believed the USDA's decision "was creating a gross injustice, unfairness in the extreme." Hanlin, at 605:6-7. Mr. Rominger responded the USDA believed it did not have authority to dismiss the FCA cases. Hanlin, at 605.

The Sunkist Board of Directors in correspondence to the USDA expressed their "outrage []" over the government's failure to dismiss the FCA cases. On May 20, 1994, Sunkist requested that its growers, packinghouses, and district exchanges call the USDA and their representatives in Congress to tell them of the unfairness of not dismissing the FCA cases. Quarles, at 682; Ex. R-110. So many phone calls were placed to the USDA that shortly after making the request Sunkist sent a second letter asking its members to stop calling the USDA because "they got the message." *See id.* Numerous letters were also sent to the members of Congress by Sunkist growers and packinghouses. Ex. R-111.

Sunkist's counsel in Washington D.C. wrote to the USDA to inform it of 31 U.S.C. § 3730(c)(2)(A), which Sunkist believed gave the government statutory authority to dismiss the FCA cases. Ex. R-95. Counsel for the packinghouse defendants wrote letters to members of Congress stating that the failure to dismiss the FCA cases created unfairness and threatened to destroy Sunkist and other defendants. These letters requested assistance in obtaining dismissal of the FCA cases pursuant to § 3730(c)(2)(A). See Exs. R-91, R-96, R-101. The extent of defendants' access to members of Congress is in part reflected by the adoption by members of Congress of a letter to the USDA, the substance of which was drafted by attorneys for the defendants. Ex. R-158.

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In late May and early June, Mr. Quarles, Sunkist vice president for corporate relations, met with members of Congress and their staff to express his views on the USDA's decision to allow the FCA cases to go forward. Quarles, at 680-82. He also informed them of defendants' view that statutory authority permitted government dismissal of FCA-claims. Several members of Congress contacted the USDA to inquire about the status of the FCA cases and to recommend that the USDA request the DOJ to dismiss the FCA cases. Rominger, at 208-09. On May 20, 1994, the USDA requested that the DOJ consider dismissing the FCA cases. Rominger, at 210-11; Ex. G-24.

The DOJ took the USDA's request under advisement and asked the parties to the FCA cases for their views on dismissal. All parties, including the relators, who personally met with the DOLT, submitted legal briefs and argument. Sunkist and the packinghouse defendants continued to contact members of Congress, the USDA and the DOJ to gain support for dismissal.[17] Several members of Congress contacted the Department of Justice to state their support for dismissal. Exs. G-26 (Senator DeConcini); G-27 (Representative Gallegly); G-28 (Senator Feinstein). On June 22, 1994, Assistant Attorney General Frank W. Hunger responded to each of these communications with a letter stating that the DOJ was "not in a position to respond at this time because this is a pending matter and no final decision has been reached." Exs. G34 to G-36. In August of 1994 the DOLT, as lawyer for the United States, 28 U.S.C. §§ 516 *et seq.*, following its independent analysis, moved to dismiss all pending FCA cases.

At the hearing, the packinghouse defendants presented expert testimony concerning the financial impact of potential

17. *See, e.g.*, Exs. R-113, 115, 122, 124-26, 129, 132, 135, 138, 139, 150, 152, 154-57, 160, 162-64.

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FCA damage awards on twelve packinghouses. Their first expert, Dr. Sexton, testified that the average FCA penalty in these cases could be as high as $14,157,000, excluding attorneys' fees.[18] Dr. Sexton was provided with anonymous summary financial information for 12 defendant packinghouses. in his opinion, none of these packinghouses had sufficient liquid assets and net equity to withstand a judgment of the magnitude sought by relators. Sexton, at 434:9-14. Only three of the twelve packinghouses could afford a $3 million judgment. Sexton, at 433. Dr. Sexton opined that any judgment that significantly exceeded the liquid assets of a packinghouse, requiring it to increase its long term debt, would force the packinghouse to increase the fees charged its growers. Consequently, such growers would switch to other packinghouses with less debt to avoid increased costs, putting the penalized packinghouses out of business. Sexton, at 436-38. Cooperative packinghouses are particularly susceptible to this cycle of disintegration. Sexton, at 439.

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18. In reaching this figure Dr. Sexton assumed that each shipment in excess of prorate involved five false forms or statements and that each false form would result in the maximum penalty of $10,000. He also assumed that the average market price per carton of oranges is $7 and that a shipment contains 500 cartons. Thus, the total penalty for a hypothetical shipment in violation of prorate would be a $50,000 fine for the five false statements plus three times the market value of a 500 carton shipment ($3,500) for a total of $60,500. Sexton, at 43234. The average number of mismanifested shipments alleged against the packinghouse defendants in these cases is 234. Sexton, at 434: 3-4. These assumptions overestimate potential FCA liability to the extent that five false forms are not filed for each shipment in violation of prorate. Sexton, at 473-74.

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The packinghouse defendants' second expert, Dr. Carman, described the indirect economic effects a large penalty would have on the counties in which packinghouses operate. Dr. Carman based his analysis on "multipliers" that estimate the effect of increasing or decreasing spending in a particular county on employment, value added, and personal income. This "inputoutput" model estimates the effects of diffuse economic activity, such as the imposition of a new tax on a community. Carman, at 96-97. Dr. Carman offered his opinion that a one million dollar judgment would cause the loss of 14-17 jobs in the county of the articular packinghouse. He also estimated that such a judgment would reduce personal income in the community by $428,000 to $606,800. Carman, at 489-90. However, Dr. Carman testified he s unaware of any published or reported instance in which this economic model has been used to estimate the secondary effects on an entire community from a judgment against a particular business. Carman, at 497.

Relators' evidence established that fractious views are held by independent growers and packinghouses on the subjects of marketing orders and prorate. Relators and independent handlers and growers who support them are estimated to represent fifteen percent (15%) of the industry. They continue to hold contentious and hostile views toward Sunkist and its members. Roth, at 52:11-13; Elliott, at 401-02; *see also* Hanlin, at 629:14-21. relators' proof raises serious doubt about the premise that dismissal of the FCA cases will bring "peace" to the citrus industry. Several of relators' witnesses stated dismissal of the CA cases would inhibit the industry from reaching consensus for new marketing order and will only exacerbate divisiveness in he industry.

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II. THE MERITS

A. Standard of Review

The government initially maintained its decision to dismiss FCA cases is unreviewable, as an exercise of its prosecutorial discretion. The court rejected this argument and required proof to show dismissal is rationally related to a legitimate government interest and not arbitrary and capricious, fraudulent, or illegal. All parties have submitted authority on alternative standards of review of dismissal: absolute prosecutorial discretion, rational relation, and Rule 41(a) prejudice.

A two part analysis applies to identify the standard of review: (1) What did Congress intend to be the standard of review for dismissals under § 3730(c)(2)(A)?; (2) Does that standard violate separation of powers by improper vesting of executive authority in the judiciary or the relator?

1. Unreviewable Prosecutorial Discretion

The government exercise of prosecutorial discretion to dismiss in criminal cases is governed by Fed. R. Crim. P. 48, and in civil cases by Fed. R. Civ. P. 41. The criminal rule contains no express standard for judicial review.[19] The civil rule vests the court with discretion to determine proper terms and conditions if the government seeks to dismiss a case after the defendant has answered or filed a motion to dismiss. Fed. R. Civ. P. 41(a). Voluntary dismissal of a FCA case is

19. Rule 48 states that the government may dismiss a' indictment, information, or complaint "by leave of the court." Fed. R. Crim. P. 48(a). Consent of the defendant is required if dismissal is sought during trial. *Id.*

authorized by the express provision of § 3730(a)(2)(A) under a unique statutory scheme, which does not refer to the Federal Rules of Civil Procedure. Where two statutes are inconsistent, generally, the more specific statute prevails. *Hellon & Assocs., Inc. v. Phoenix Resort Corp.*, 958 F.2d 295, 297 (9th Cir. 1992). This case is governed by the specific FCA dismissal authority, § 3730(c)(2)(A). Congress is presumed to be knowledgeable of existing law pertinent to legislation it enacts. *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988). It could have incorporated by reference the standards of Fed. R. Civ. P. 41(a) if it so intended, but did not. *See Hellon & Assocs.*, 958 F.2d at 298.

In their post-hearing brief the packinghouse defendants argue that on its face § 3730(c)(2)(A) gives the executive the discretion to dismiss FCA cases for any reason (or no reason at all) so long as dismissal is not based upon constitutionally impermissible considerations such as race, religion, or exercise of First-Amendment rights. The statute provides no express standard of review for dismissal. The most that can be determined from the face of the statute is that Congress intended to provide the relator an opportunity to object to dismissal of a FCA case and to be heard by the court. That the statute requires a judicial hearing directly implies the decision to dismiss under § 3730(c)(2)(A) is reviewable by the court.

The defendants, claim the statute is susceptible of only one interpretation is belied by the legal interpretation the USDA gave the dismissal section prior to filing these motions. John Golden, Associate General Counsel to the USDA, testified that prior to May 16, 1994, "the Department was of the view that some independent legal basis had to be adduced in order to seek dismissal of these cases and that [§3730](a)(2)(A) provided

an opportunity for the government to seek to dismiss the cases if there was some other independent legal basis to do so." Golden, at 647:15-19. The USDA paper entitled "Overview of False Claims Act Issues" stated, "the government does not have authority to dismiss the *qui tam* cases unilaterally." Ex. G-1. Although statutory interpretations by the agency for whose benefit the case was prosecuted are not binding on the government in this motion,[20] they undercut the defendants' argument that the only plausible interpretation of § 3730(c)(2)(A) is to give the government unreviewable discretion.

Because the statutory language of the dismissal section is ambiguous it is appropriate to consider legislative history. *See, e.g., Funbus Systems, Inc. v. California Pub. Utils. Comm'n*, 801 F.2d 1120, 1125-26 (9th Cir. 1986). The legislative history of § 3730(c)(2)(A) and the 1986 amendments to the FCA provide insight to Congressional concern about the government's lack of resolve or willingness to prosecute FCA cases.[21] *See also U.S. ex*

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20. The Department of Justice, not the USDA, is principally responsible for interpreting and enforcing the FCA. Golden, at 644:16-20.

21. The government and the defendants argue that the Senate Report cited-in the text does not accurately reflect Congressional intent concerning the final bill passed by both houses. The relevant portion of the Senate version bill at the time of the Senate Report read as follows:

> [the relator] shall be permitted to file objections with the court and petition for an evidentiary, hearing to any proposed settlement or to any motion to dismiss filed by the Government. The Court may grant such an evidentiary hearing only upon a showing of substantial and particularized need.

132 Cong. Rec. S 9805 (July 28, 1986). Subsequently this passage was removed from the bill and replaced with the language of the current statute:

(Cont'd)

rel. Shumer v. Hughes Aircraft Company, 95 Daily Journal D.A.R. 11325, 11328 (9th Cir. August 22, 1994); Senate Judiciary Committee, False Claims Amendments Act of 1986, S.Rep. No. 345, 99th Cong., 2d Sess. 25-26 (1986), *reprinted in*, 1986 U.S.C.C.A.N. 5266, 5291. The Senate Report states that the relator' s right to object to dismissal is intended to serve, "as a check that the Government does not neglect evidence, cause undue delay, or drop the false claims cases without *legitimate* reasons." *Id.* (emphasis added). The report articulates that an evidentiary hearing is appropriate "if the relator presents a colorable claim that the settlement or dismissal is unreasonable in light of existing evidence, that the Government has not fully investigated the allegations, or that the Government's decision was based on arbitrary or improper considerations." *Id.*

(Cont'd)

> The Government may dismiss the action notwithstanding the objection of the [relator] if the [relator] has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

31 U.S.C. § 3730(c)(2)(A). It does not follow from the amendment that the prior Senate Report no longer reflects Congressional intent with regard to FCA dismissals by the government. The substance of the dismissal provision is essentially unchanged from its earlier form except in two respects: (1) the enacted version of the bill does not explicitly state whether the hearing on the motion is an evidentiary hearing; (2) the enacted statute does not require the relator to show a "substantial and particularized need" to receive a hearing on the motion. Nothing in the legislative history or the amendments themselves suggest that Congress amended the bill to give the Department of Justice authority to dismiss FCA cases arbitrarily or for illegitimate reasons. To so interpret the law would in large measure defeat the express purpose of the FCA. Congress intended to increase the role of the relator in FCA litigation "to keep pressure on the Government to pursue the case in a diligent fashion." 132 Cong. Rec. H 9382 (October 7, 1986).

Appendix B

Congressional concern about the government's improper dismissal of FCA cases was addressed by a hearing requirement and reference to a legitimate reason for dismissal. All of this directly contravenes an unreviewable discretion standard.

Defendants implicitly suggest that Congress violated the constitutional principle of separation of powers by providing for judicial intervention to review the exercise of prosecutorial discretion in dismissal of an FCA case. The government argues that judicial review of prosecutorial discretion is limited to a determination of whether the government's conduct infringes constitutional guarantees, such as equal protection or First Amendment freedoms. The government and defendants are correct, the separation of powers doctrine places significant limits on the judiciary's power to review prosecutorial decisions, *see United States v. Microsoft*, 56 F.3d 1448, 1457-62 (D.C. Cir. 1995), as does the language of the dismissal statute. Congress could have, but did not, provide a "fair, adequate and reasonable" review standard as it did in the FCA settlement approval section. § 3730(a)(2)(B). The court does not substitute its judgment for that of the executive on matters of policy, just as the court does not "sit as a 'superlegislature to weigh the wisdom of legislation.' " *Ferguson v. Skrupa*, 372 U.S. 726, 731 (1963) (quoting *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952)).

However, the constitutional separation of powers does not require that the government's exercise of prosecutorial discretion to dismiss a FCA case remain completely insulated from judicial review. *See United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 757 (9th Cir. 1993); *cf. Microsoft*, 56 F.3d at 1462 ("the district judge is not obligated to accept a [consent decree] that, on its face and even after government explanation,

appears to make a mockery of judicial power"). In *Boeing* the Ninth Circuit addressed several constitutional challenges to the FCA including, *inter alia*, that the provisions limiting government intervention in and dismissal of FCA cases improperly vest the judiciary with executive authority. *Boeing*, 9 F.3d at 755-57. The court recognized these provisions "may affect the government's prosecutorial discretion to some degree," but concluded: "the FCA does not authorize the judiciary to infringe on prosecutorial discretion beyond the bounds established" by the Supreme Court in *Morrison v. Olson*, 487 U.S. 654, 691-93 (1988). *Id.* at 757.

Morrison upheld the provisions of the Ethic's in Government Act of 1978, 28 U.S.C. §§ 49, 591 *et seq.*, which allow for the appointment of an "independent counsel" to investigate and prosecute government officials for violations of federal criminal laws. The Act was attacked because it required the Attorney General to show "good cause" to remove an independent counsel. The Court found this provision constitutional:

> We see no constitutional problem in the fact that the Act provides for judicial review of the removal decision. § 596(a)(3). *The purpose of such review is to ensure that an independent counsel is removed only in accordance with the will of Congress as expressed in the Act. The possibility of judicial review does not inject the Judicial Branch into the removal decision, nor does it, by itself, put any additional burden on the President's exercise of executive authority.*

Morrison, 487 U.S. at 693 n.33 (emphasis added).

Morrison's analysis is applicable here. Congress provided for judicial review of FCA dismissal motions to ensure that the executive enforces the FCA in accordance with the intent of Congress. Congress intended that FCA claims be dismissed for legitimate government purposes, and not as a result of fraud, illegality, or lack of political will. S. Rep. No. 345, 99th Cong., 2d Sess. 25-26 (1986), *reprinted in*, 1986 U.S.C.C.A.N. 5266, 5291. Judicial review does not inject the court into the executive's decision to dismiss. Nor does it place an additional burden on the executive's exercise of prosecutorial discretion, because the constitution itself prohibits arbitrary or irrational prosecutorial decisions. *United States v. Redondo-Lemos*, 955 F.2d 1296, 1299-1300 (9th Cir. 1992).

Although courts are reluctant to scrutinize prosecutorial charging decisions, which involve many practical considerations outside the purview of judicial review, review of a decision to dismiss an FCA case is limited to determining whether the government has a legitimate government interest that will be achieved by dismissal, which is not arbitrary or otherwise illegal. Historically courts have made such determinations of the lawfulness of executive function under a rational-basis standard. *See Reno v. Flores*, 113 S. Ct. 1439, 1447-49 (1993) (applying rational basis review to substantive due process claim involving non-fundamental rights). The standard of review is deferential to preserve the traditional authority of the executive branch to make policy choices about the litigation it pursues. The court's limited review of the motion to dismiss does not permit the court "to infringe on prosecutorial authority to a degree beyond the bounds established by *Morrison*" and therefore does not violate the separation of powers. *Boeing*, 9 F.3d at 757.

2. Rational Relation Standard For FCA Dismissal

The motion to dismiss is based not only on the USDA's decision, but also the independent judgment of its litigation counsel, the DOJ. Although under the APA the court determines whether agency action is arbitrary or capricious by examining:

> whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment . . . Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.

Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971); such an analysis does not directly apply to an agency's decision to institute, prosecute, and dismiss litigation. This is not APA review of agency action under 7 U.S.C. § 608c(15)(B), rather the motion tests the United States' decision to terminate FCA litigation, implemented by the DOJ.

The parties have argued, assumedly by analogy to the APA, that an agency decision is arbitrary if the agency "has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Hawaii Helicopter Operators Ass'n v. F.A.A.,* 51 F.3d 212, 214-15 (9th Cir. 1995). However, if the agency examines the relevant facts and reaches a conclusion that is rationally supported by the facts then its decision is not

arbitrary, *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983), even if the decision is a "stupid" one, *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1487 (9th Cir.) (Under APA review, "[s]o long as it explains its reasons, [an agency] may adopt a rule that all commentators think is stupid or unnecessary."), *cert. denied*, 113 S. Ct. 598 (1992). The extent of factual support required is "enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn is one of fact for the jury." *United States v. Sunny Cove Citrus Ass'n*, 854 F. Supp. at 673 (quoting *Association of Data Processing Serv. Orgs., Inc. v. Bd. of Governors of the Fed. Res. Sys.*, 745 F.2d 677, 683 (D.C. Cir. 1984)). Dismissal of litigation by the executive branch is governed by different rules.

If dismissal serves a legitimate government purpose it is in the interests of justice, a ground long recognized in criminal law as supporting government dismissal of a case, except where the prosecutor's actions indicate a betrayal of the public interest. *United States v. Gonzales*, 158 F.3d 459, 461-62 (9th Cir. 1995). In analogous situations, courts have applied the "rational relationship" test to determine whether legislation is constitutional or executive action violates substantive due process. *See Lockary v. Kayfetz*, 917 F.2d 1150, 1155 (9th Cir. 1990); *Jackson Water Works, Inc. v. Public Utilities Comm'n*, 793 F.2d 1090, 1094 (9th Cir. 1986), *cert. denied*, 479 U.S. 1102 (1987).

"Application of the rational basis standard requires a two-step analysis." *Jackson Water Works*, 793 F.2d at 1094. First, the court must determine whether the challenged action has a legitimate purpose. *Id.* Second, there must be a reasonable fit between the governmental purpose and the agency action.

Reno v. Flores, 113 S. Ct. 1439, 1448-49 (1993). There need not be a "tight fitting relationship" between the two; it is enough that there are "plausible," or "arguable," reasons supporting the agency decision. *See Jackson Water* Works, 793 F.2d at 1094. The action need not be the best choice among competing alternatives, but merely a rational choice. *See Vermouth v. Corrothers*, 827 F.2d 599, 603 (9th Cir. 1987). A two step analysis applies here to test the justification for dismissal: (1) identification of a valid *government* purpose; and (2) a rational relation between dismissal and accomplishment of the purpose.

B. The Government's Reasons For Dismissal.

In support of the motion Deputy Secretary Rominger submitted a declaration that in paragraph 11, stated:

> The USDA based its decision on a desire to end divisiveness over the marketing orders, to terminate protracted and burdensome litigation, to protect the United States' taxpayers from continuing and escalating litigation expenses, to curtail the drain on private resources resulting from the litigation, and to allow the growers, agricultural cooperatives, handlers and others to work together in shaping new marketing tools.

Rominger dec. ¶ 11.

1. Peace In The Industry

The first interest identified, under the AMAA of 1937 and of 1947, is "a desire to end divisiveness over the marketing orders." The relators counter: neither Act is a legislative

mandate that the USDA encourage cooperation in industries not regulated by marketing orders, and dismissal of these cases will not bring industry peace.

The AMAA seeks to achieve orderly market conditions and stabilize supplies and prices of agricultural commodities for the benefit of farmers and consumers. The principal mechanism to achieve these goals is the marketing order.[22] The success of marketing orders depends upon industry support for and compliance with the regulations. Clayton, at 199:1-13. in the words of the Supreme Court, the AMAA "contemplates a cooperative venture among the Secretary, handlers, and producers." *Block v. Community Nutr.* Inst., 467 U.S. 340, 346 (1983). There is no requirement that any agricultural industry have a marketing order. Nonetheless, cooperation among industry participants is a purpose of the Act.

The AMAA does not specify that the Secretary must achieve cooperation, consensus, or peace in industries that do not have active marketing orders. The AHAA does not oblige the Secretary to mediate disputes in industries that have not chosen regulation, nor to make peace among competitors who do not wish to cooperate with each other. The government's interest is limited to facilitating cooperation and enforcing compliance with existing marketing orders so that the benefits of orderly marketing processes, stable markets, and higher prices, which the super-majority of the industry seek to achieve, are not thwarted by a minority of industry members who oppose regulation.

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22. Marketing orders require supermajority industry approval 7 U.S.C. § 608c(a)(B). Defendants inferentially suggest that relators, by their strident opposition to prorate and relentless pursuit of litigation against Sunkist and its members, have bee able to thwart the majority rule within the industry.

Appendix B

The government also argues that the Agricultural Marketing Act (AMA) of 1946, 7 U.S.C. § 1621, et *seq.*, creates an interest in eliminating divisiveness in the industry. The AMA was enacted to improve marketing of agricultural products by encouraging:

> (1) continuous research to improve the marketing, handling, storage, processing, transportation, and distribution of agricultural products; (2) cooperation among Federal and State agencies, producers, industry organizations, and others in the development and effectuation of research and marketing *programs* to improve the distribution processes; (3) an integrated administration of all laws enacted by Congress to aid the distribution of agricultural products. . . .

7 U.S.C. § 1621. Despite the AMA's reference to "cooperation", the Act does not direct the Secretary to achieve industry cooperation in the abstract. Rather, the statute directs the USDA to cooperate with other government agencies, industry participants and others in development of research and marketing programs to improve the distribution processes. No evidence was presented that the existence or nonexistence of the terminated marketing orders, prorate, or the existence of dissension or a lack of cooperation has had any deleterious effect on marketing programs, distribution processes, prices, handling, storage, processing, or transportation of fruit in the California-Arizona citrus industry. Ending divisiveness among industry participants to achieve peace is not a stated AMA goal. No witness identified any stated policy of the AMA of 1946, 7 U.S.C. § 1621, *et seq.*, as a ground for dismissal.

The evidence proved that dissension and a lack of cooperation in the citrus industry were caused by the adverse

economic effects of the disputed marketing orders, particularly prorate. Rominger, at 202. The Secretary believed industry divisiveness was frustrating the purposes of the AKAA, Clayton, at 59, that there was a need to restore stability and cooperation to permit operation of a marketing order, which was needed to protect orderly markets in times of unusual weather or other adverse conditions. Rominger, at 219-220; Clayton, at 59.

The goal of achieving industry cooperation to permit the development of new marketing methods and to stabilize markets are legitimate concerns of the USDA, which may be incidentally advanced by dismissal of these cases. The evidence did not establish that dismissal of these cases will necessarily bring "peace" to the industry. To the contrary, adoption by dominant industry members of unfair regulations under the bloc voting provisions of the AMAA guarantee perpetuation of divisiveness and lack of cooperation. Industry cooperation to improve distribution processes, industry market stability, and increased prices are valid interests. That dismissal to achieve a "clean slate" may not achieve industry cooperation or peace does not prevent a finding that dismissal is reasonably related to achievement of these interests under the AMAA.

2. Facilitating A New Marketing Order.

A second alleged interest is achieving industry consensus for new citrus marketing orders. The relators argue the USDA has no authority to affirmatively build support for a new marketing order in industries that have not reached consensus favoring an order.

The government concedes the AMAA does not require the USDA to "take steps to institute new orders or to replace

terminated orders with new ones." (Gov't brief, at 27:15-17). According to Dr. Clayton, "the way the 1937 Act works it is up to industry to approach the Department and seek authorization to use the tools available through Marketing Orders." Clayton, at 110:10-12. There are active marketing orders in less than half the fruit and vegetable industries authorized to establish marketing orders. Clayton, at 107. The USDA has not sought to achieve consensus around a marketing order in those unregulated industries. Clayton, at 107-10. Although AMAA regulations authorize the USDA to propose marketing orders, 7 C.F.R. § 900.3, the USDA generally waits for industry participants to propose an order. It cannot impose orders that are not supported by the industry.

The government suggests it has greater responsibility to perpetuate marketing orders in the citrus industry, based on forty years of regulation under orders 907, 908, and 910. Dr. Clayton characterized the USDA as a "partner" with the industry that had "some ownership" of the lack of consensus for a new marketing order. Clayton, at 110-11. However, the USDA has made no efforts to establish new orders in approximately ten other industries in which AMAA marketing orders were terminated in recent years. Clayton, at 111. Termination of the citrus orders was said to be unique, because unlike the other industries, in which there was consensus marketing orders were not needed, many members of the citrus industry indicated support for a new marketing order.[23] The USDA terminated the

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23. One possible explanation for the apparent absence of industry consensus for termination of the citrus marketing orders is that those who were privately unwilling to abide by prorate had great incentives to support it publicly. Prorate cheaters received higher prices for their fruit and increased market share at the expense of their law-abiding competitors. Clayton, at 120-21.

citrus marketing orders to send a message to the citrus industry and others that widespread intentional violations of a marketing order will result in the order's termination. Rominger, at 202:8-19.

NOAC and VOAC reports show considerable efforts toward amending the orders that bogged down over concerns about this litigation. These committees went so far as to request the USDA's help in developing new marketing orders. Ex. G-69. Although there was no consensus, many different segments of the industry preferred amending the existing orders or creating a new marketing order to having no orders. For example, Growers for Modern Marketing, a group opposed to prorate, stated that it believed "a new marketing order is essential." Ex. G-57, at 5; *see also* R-225, R-250. The USDA also referenced the 1991 referendum to continue the orders.[24] Rominger, at 272-73.

Under USDA regulations the Secretary can propose a marketing order for listed commodities. 7 C.F.R. § 900.3. However, neither the AMAA nor the regulations specifically address whether the USDA may take actions to encourage an industry to approve a marketing order, once an order is proposed.

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24. The results of the 1991 referendum, in which 19% of the producers voted to continue the orders, may not have accurately reflected the extent of the industry's support for the marketing orders due to Sunkist's bloc vote in favor of the orders. The partial results from a straw poll conducted by Sunkist prior to the 1991 referendum showed that 64 growers marketing 2,881,146 field boxes of naval oranges favored continuation of the orders, while 63 growers marketing 1,883,757 field boxes opposed continuation of the orders. Ex. R-19, at 4. These results reflected the ballots of approximately 511 of Sunkist's member growers.

Appendix B

The USDA interprets its mandate under the AKAA to include facilitating the approval of marketing orders in industries that support the adoption of an order. When industry members propose an order, the USDA provides information and assistance. Golden, at 639:7-14. USDA officials work to foster the development of marketing orders when they believe an order will promote the policies of the AMAA. The government argues that encouraging consensus for a new beneficial marketing order is a legitimate interest under the USDA.

The government claims this interpretation of the AKAA is entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984):

> When a court reviews an agency's *construction of* the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress had directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statue is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 842-43. "[A]n agency's interpretation of its own organic statute and regulations are accorded deference, 'unless the

administrative construction is clearly contrary to the plain and sensible meaning of the regulation.' " *Borregard v. National Transp. Safety Bd.*, 46 F.3d 944, 945 (9th Cir. 1995) (quoting *Hart v. McLucas*, 535 F.2d 516, 520 (9th Cir. 1976)).

The AMAA does not specifically address whether the USDA can promote the development of new marketing orders by resolving disputes that prevent an industry from reaching consensus. However, the USDA's interpretation, that the AMAA permits the USDA to resolve industry disputes and foster consensus for a new marketing order, when industry interest for a new order appears, is reasonable and not contrary to the plain meaning of the statute.

The evidence established that substantial sentiment was expressed to the USDA, through NOAC and VOAC meetings, the Dooley meetings and independent industry members, for development of new orders. Relators counter that there is no desire or need for new orders. Even if the USDA's perception that the industry seeks new orders is mistaken, it was proved the view is not held in bad faith. After the 1993 suspension of prorate and the 1994 termination of the marketing orders, the citrus industry has shown no signs of disorderly or unstable markets. Rominger, at 220. This does not mean new orders are unnecessary. Marketing orders in part are to assure stable markets and prices when weather, supply interruptions, or other market disrupting forces occur. Rominger, at 219-20.

USDA-perceived industry sentiment for a new marketing order is a valid government interest under the AMAA which the USDA can act to facilitate. -That dismissal of the cases will not assure the adoption of new orders does not make dismissal irrational.

3. Financial impact on industry Participants

A third interest is "to terminate protracted and burdensome litigation, . . . [and] to curtail the drain on private resources resulting from the litigation." Dismissal is said to be necessary to protect economic viability of the citrus industry. The government argues the continuing cost of litigating these cases and the potential for massive damage awards threatens to bankrupt the defendant packinghouses.

Protecting the financial health of the agriculture industry is a cornerstone of AMAA policy. The Act declares: "disruption of the orderly exchange of commodities in interstate commerce impairs the purchasing power of farmers and destroys the value of agricultural assets which support the national credit structure and that these conditions affect transactions in agricultural commodities with a national public interest." 7 U.S.C. § 601(c). Congress has decided that the protection of farmers' purchasing power and preservation of agricultural assets is in the national public interest. Protecting citrus handlers from financial ruin is a legitimate government interest.[25]

At the evidentiary hearing the packinghouse defendants presented expert testimony showing their inability to satisfy

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25. It could be argued that Congress primarily intended the AMAA to protect agricultural producers, not handlers. For example, the Act is intended to assure parity prices for farmers (not packinghouses), 7 U.S.C. § 602(1), and a marketing order can become effective without handler support if it has sufficient support from farmers and the Secretary makes certain findings. 7 U.S.C. 608c(9). Nevertheless, the declared policy of protecting "agricultural assets" is broad enough to encompass the assets of those who market agricultural products, the handlers, as well as those who produce them. 7 U.S.C. § 601. Moreover, financial destruction of handlers would necessarily harm the economic interest of farmers who utilize handlers' services to process and market fruit.

the potential damage awards in these cases. The evidence showed that most, if not all, of the twelve packinghouses, anonymously analyzed, would be bankrupted by the maximum possible penalties under the FCA. The average penalty under the FCA is seventeen times greater than under the AMAA. Sexton at 433. The destructive potential of these cases was convincingly established.[26] The government also argues that the expense to the taxpayers and the defendants of litigating these cases justifies dismissal. However, no evidence quantifying litigation costs incurred by the government and the defendants, nor the effect of litigation costs on any defendant's financial condition was proferred.

The relators point to Deputy Secretary Rominger's testimony that protecting the economic viability of the defendants was not "determinative," Rominger, at 265, to support their contention that adverse economic impact was not a reason for dismissal. The USDA did not then have before it the financial evidence adduced at the evidentiary hearing. Policy makers within the USDA were informed by staff that the FCA cases could bankrupt some packinghouses. Rominger at 203, 264-65. The Secretary's counsel stated the economic effect on the industry and the defendants was considered in the dismissal analysis. Schnoor dep at 21:1-8.

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26. Dr. Carman's testimony as to the extent of the impact on county-wide employment and personal income from judgments against the packinghouse defendants was less convincing. The economic model he used was not developed to measure the impact on a community of a judgment against a single business entity. Rather, it was designed to model the consequences of diffuse infusions or withdrawals of capital, such as taxes. Carman, at 496-97. Dr. Carman was unaware of any instances in practice or in economic literature in which the model was used for this purpose. Carman, at 497.

Appendix B

The packinghouse defendants contend the *government* had evidence of potential financial harm through *information* furnished in the settlement process and communications about the financial condition of at least one packinghouse defendant. Ex. R-204. APA review of agency action under the arbitrary and capricious standard does not permit an agency to justify its actions by advancing post hoc rationalizations or to rely on evidence not presented during the adjudicatory or rulemaking process. *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156, 168-69 (1962); *Louisiana-Pacific Corp. v. Block,* 694 F.2d 1205, 1210 (9th Cir. 1982). This APA standard of review is not applicable to the United States' decision to dismiss FCA cases. The validity of the decision to dismiss is determined by the reasons and evidence presented to the court in support of and opposition to the motion. Review is not limited to the reasons or evidence relied upon by the agency at the time it arrived at the decision to move for dismissal.

A principal purpose of the AMAA is to ensure the economic vitality of the agriculture industry. The USDA determined that the burden of this protracted litigation and the potentially enormous penalties that could result, threatened to destroy part of the citrus industry. Dismissing these FCA cases is a rational means of advancing the legitimate government interest under the AMAA to protect the purchasing power of farmers, agricultural assets, and the national credit structure in the statutorily defined national public interest.

4. Conservation Of Government Resources.

The government can legitimately consider the burden imposed on the taxpayers by its policies. Here, the government concluded that expenditure of the extensive resources required

to continue prosecution and defense of all prorate violation cases was disproportionate to the benefits obtainable. To continue the AMAA enforcement actions, the government would have to bear the expense of hearings on the 1984 marketing orders plus the cost of the AMAA litigation and any litigation challenging the validity of the marketing orders. In light of the divisiveness over the citrus marketing orders, USDA concluded the costs of continued litigation of AMAA and FCA cases outweighed benefits of curing the procedural deficiencies in the 1984 orange marketing orders and any economic recovery under the FCA.

Relators argue the government should continue to prosecute violators under FCA cases because: (1) FCA claims based on prorate violations are not affected by invalidity of the underlying marketing orders, *See United States v. Kapp,* 302 U.S. 214, 216-18 (1937) (upholding, validity of criminal prosecution under former False Claims Act for misrepresentation in transaction governed by Agricultural Adjustment Act (AAA) after the AAA was found void); and (2) the government can allow the relator to bear the expense of the litigation at no cost to the United States. The government believes FCA claims cannot be asserted under the AMAA; and wishes to preserve its right to challenge subject matter jurisdiction on appeal. Rominger, at 212-13. It seeks to remain in control of the FCA litigation based on its belief relators do not adequately represent the United States' interests due to their long history of hostility to federal regulation under the AMAA, extended acrimonious litigation against the government and industry competitors, and their goal of maximizing the amount of monetary recovery against defendants.

USDA also argues continued internal staff costs incurred in these FCA cases are enormous, although unquantified.

Concerns about the burden on government resources are valid, even if relators assumed all of the expense of prosecuting the FCA cases.

5. Equity Within The Industry.

Equitable treatment of all handlers who cheated is a separate interest. The government points out that if the FCA cases proceed, primarily Sunkist and some of its affiliated packinghouses will be held accountable for prorate violations, while the rest of the industry will receive amnesty. It contends this is unfair to the FCA defendants, particularly since potential liability under the FCA greatly exceeds damages and penalties that could be assessed under the AMAA. Relators do not deny that the executive is vested with the power to grant amnesty to law violators.

The Fifth Amendment precludes the government from employing classifications that are "wholly without any rational basis." *United States Department of Agriculture v. Moreno*, 413 U.S. 528, 538 (1973). The government does not claim it is compelled by the constitutional principle of equal protection to dismiss the FCA cases. Rather, it asserts a legitimate *government* interest in treating similarly-situated prorate cheaters equally. *See, e.g., Morici Corp. v. United States*, 500 F.Supp. 714, 723 (C.D. Cal. 1980), *rev'd on other grounds*, 681 F.2d 645 (9th Cir. 1983). The AMAA forfeiture cases and these FCA cases are aimed at punishing the same type of wrongful conduct: shipping fruit in excess of prorate and failing to accurately report and pay assessments for unreported shipments. Since the AMAA cases have been dismissed, if the FCA cases are prosecuted one group of cheaters, composed almost entirely of Sunkist affiliated packinghouses, will be

punished while all other prorate violators will go unpunished. The evidence established cheating was widespread in the industry: Sunkist, Dole, Central California Orange Growers, numerous independents, Sequoia, Sunny Cove, Eco Farms, Suntreat, and Cecelia Packing have been identified. Lewis, at 306-312.

Relators counter that dismissal is inequitable because it allows packinghouses that cheated to keep their "ill-gotten gains." However, FCA recovery will not compensate innocent packinghouses for profits or market share lost to prorate violations. Any FCA recovery will only benefit Sequoia (an alleged wrongdoer), its counsel, and the United States Treasury. FCA penalties are completely unrelated to the economic harm caused to innocent handlers by prorate cheaters. Unlike antitrust and unfair competition laws, the FCA is not designed for use by private entities to deter anticompetitive conduct or to compensate resulting losses. Dismissal of these FCA cases has no direct economic impact on innocent handlers.[27] Dismissal of the FCA cases will further the government's interest in equal treatment for all prorate cheaters by making its policy of amnesty universal. The government also believes that its dismissal of Sequoia from an AMAA enforcement case the government valued at three million dollars militates in favor of dismissal. The government's "equal treatment of violators" objective is a valid purpose that will be furthered by dismissal.

The government has articulated legitimate reasons for dismissal of these cases, which will be served by dismissal; the burden shifts to relators to demonstrate that dismissal is fraudulent, arbitrary and capricious, or illegal.

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27. The only possible benefit to innocent handlers from prosecution of the FCA cases is the potential that some of their competitors will be bankrupted by this litigation.

Appendix B

C. Relators' Objections.

1. Dismissal Is Not Fraudulent.

Relators argue the government has committed fraud on the court, perpetrated by three categories of false representations made by government trial counsel to the court.

The first alleged misrepresentation is the government's statement at the August 1993 hearing on its motion to intervene that it would litigate the FCA claims against the defendants if settlement efforts were unsuccessful.[28] (Aug. 9, 1993, Trans. at pp. 22-24). Relators claim the government misled the court about its true intent for intervening, because two USDA officials testified the government's sole purpose for intervening was to negotiate a global settlement, *See* Rominger, at 214, 261; Golden, at 634; although both these witnesses testified USDA policymakers had not discussed what they would do if the efforts at settlement failed. Rominger, at 261-62; Golden, at 634.

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28. The relators have also argued that the government is judicially estopped from dismissing these FCA cases based upon representations made in connection with the motion to intervene. This argument was rejected in the prior Memorandum Opinion, at 10-12. Judicial estoppel bars a party from manipulating the judicial process by asserting inconsistent legal positions in the same litigation. *See Morris v. California,* 966 F.2d 448, 452 (9th Cir. 1991), *cert. denied,* 113 S. Ct. 96 (1992). The statement of the government's trial counsel, made during oral argument on the motion to intervene, that the government intended to prosecute the FCA cases was not an unalterable legal position. The government's change in policy toward the FCA cases was the result of changed circumstances in the industry. Judicial estoppel is an equitable doctrine. *Id.* Equity is not served by compelling the government to prosecute a case that undermines legitimate government interests.

Appendix B

The statements of the government's counsel appear to be inconsistent with the USDA's intent in entering the cases. The DOJ, not the USDA, has ultimate responsibility for prosecution of FCA cases. It is unclear whether the government's trial counsel knew the USDA, which in retrospect states it never had the intent to prosecute these FCA claims to conclusion, was so informed when he represented to the Court the United States would prosecute the FCA claims if necessary. The absence of evidence whether the DOJ was fully advised by its client, USDA in August 1993, that USDA would in no event try the FCA cases to conclusion prevents a finding that the government's trial counsel misrepresented the then existing intent of the USDA or the DOJ. As case manager, the DOJ's intent about prosecuting these FCA cases may have differed from the USDA's.

Assuming, *arguendo,* that the government's representation that it would litigate the FCA cases was false, the intervention order could have been rescinded to remove the government as plaintiff in the case. The government still had the ability to reintervene for the purpose of bringing this motion to dismiss. Good cause[29] for reintervention could be established upon a showing of changed circumstances, to justify the government's exercise of its statutory authority to dismiss. The DOJIs failure to reach a global settlement, the industry's inability to form consensus on new marketing orders, and the announcement of the *Sunny Cove* decision prompted the USDA to reconsider its prosecution of violations of the 1984 citrus marketing orders.

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29. The FCA provides that the government may intervene in a FCA case "upon a showing of good cause." 21 U.S.C. § 3730(c)(3); *see United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 753 (9th Cir. 1993), *cert. denied,* 114 S. Ct. 1125. No limit is placed on the circumstances or the number of intervention motions that the government may bring.

Clayton, at 132-34, 138-44, 186-87. Even if the government's prior intervention was premised on a misrepresentation, independent grounds existed for reintervention.

The second alleged misrepresentation concerns jurisdiction. When these cases were first filed, the government unsuccessfully argued that subject matter jurisdiction did not exist under the FCA. Relators claim the government subsequently acquiesced to subject matter jurisdiction by: (1) filing the November 3, 1993, *amicus* brief in the *Stark Packing* case, No. CV-F-89-058; (2) filing the third amended complaint asserting FCA claims in the *Magnolia* case; and (3) representing on August 9, 1993, that it would try the FCA cases if necessary.[30] Whether the government acquiesced in subject matter jurisdiction is irrelevant for the purposes of this motion. The government seeks to dismiss these cases for the reasons stated in its motion, not for absence of jurisdiction based on a lack of substantive merit of the FCA claims.

Finally, the relators argue the government deceived the court about the status of the global settlement and deliberately delayed making settlement submissions to impede the progress of the cases and inferentially to provide time for a political solution. The evidence does not disclose fraud by the government concerning the global settlement negotiations. The evidence proved the government made substantial good faith efforts to settle all cases over an extended time period. The government claims it did not submit any proposed settlements

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30. In each case the government explicitly reserved its right to challenge subject matter jurisdiction on appeal. The anamoly of when or in what context such an appeal might be taken, in view of the undertaking of DOJ trial counsel to prosecute the FCA claims to recovery, has not been explained.

to the court for approval within the time established by the September 9, 1993, Settlement Procedures Order because it did not receive acceptable settlement offers. The government updated the Court with accurate settlement status reports on November 8, 1993, and January 28, 1994. No party could reasonably have anticipated the April 1994, *Sunny Cove* decision. There is no evidence that the government wrongfully delayed or did anything but utilize its best efforts to induce settlements of all outstanding AMAA and FCA cases.

No other evidence of fraud was adduced. Although the apparent inaccuracy of DOJ's trial counsel's statements to the court about continued prosecution of the FCA cases is disturbing, relators did not depose AUSA Bensing or otherwise offer evidence of what information had been provided to him by the USDA regarding future prosecution of the FCA claims at the time he made such statements to the Court. The USDA position on the litigation has changed over time from active AMAA enforcement, to global settlement, to industry-wide dismissal. The government does not stand to gain from any alleged fraud. Nor is there any evidence that packinghouse defendants procured the intervention of the United States by wrongful means for the sole purpose of dismissing the cases. No fraud to procure dismissal of the FCA cases has been proved.

2. Improper Or Undue Influence.

Dismissal must not be the product of improper or undue influence on government officials. However, citizens are entitled to petition the government for redress of grievances by advocating the passage or enforcement of laws. *See Eastern R.R. President's Conf. v. Noerr Motor Freight,* 365 U.S. 127, 135-38 (1961) (Sherman Act does not apply to "mere

solicitation of governmental action with respect to the passage and enforcement of laws").

Members of Congress may seek to influence agency action. *See Radar Ass'n on Defending Airwave Rights, Inc. v. United States Dept. of Transp.*, 47 F.3d 794, 807 (6th Cir. 1995), *petition for cert. filed* 63 U.S.L.W. 3849 (May 18, 1995). Congressional influence is improper only if the agency is asked to consider factors not relevant to the decision and the agency's determination is affected by the extraneous considerations. *Sierra Club v. Costle*, 657 F.2d 298, 409 (D.C. Cir. 1981); *Fallini v. Hodel*, 725 F. Supp. 1113, 1118 (D. Nev. 1989), *aff'd*, 963 F.2d 275 (9th Cir. 1992). "Americans rightly expect their elected representatives to voice their grievances and preferences concerning the administration of our laws . . . it [is] entirely proper for Congressional representatives vigorously to represent the interests of their constituents before administrative agencies engaged in informal, general policy *rulemaking*." *Sierra Club*, 657 F.2d at 409.

Relators claim that improper pressure and undue influence from the defendants and members of Congress tainted the USDA's decision to seek dismissal of the FCA cases. Defendants strenuously campaigned for dismissal of the FCA cases after the May 16, 1994 announcement it would terminate marketing orders, dismiss the AMAA cases, and withdraw from the FCA cases. Defendants believed it was unfair not to also dismiss the FCA cases. They exercised their right to petition the government by letters, phone calls, and personal visits to USDA officials, the DOJ, and members of Congress. There is no evidence that the defendants engaged in bribery, fraud, coercion, or a conspiracy with government officials to violate the law. *Cf. California Motor Transport Co. v. Trucking*

Unlimited, 404 U.S. 508, 510, 512-15 (1972) (antitrust immunity for lobbying activities not applicable to bribery, fraud, or conspiracy to harm a competitor). The frequency and manner of defendants' contacts with government officials prior to the USDA's decision to seek dismissal of the FCA cases give the appearance that defendants had unique access, but do not of themselves establish improper influence.

Nor did Congressional contacts with the USDA and the DOJ constitute undue influence. The evidence shows the contacts among members of Congress, the USDA and the DOJ concerned subject matter that could properly be discussed. For example, Senator Dennis DeConcini wrote in a letter to the DOJ that dismissal "would be consistent with the actions of the Department of Agriculture and indeed give the citrus industry a fresh start." Ex. G-26. Representative Elton Gallegly stated his support for the USDA's policy "objective of ending the divisive and costly litigation which has afflicted the citrus industry for over a decade." Ex. G-27. Senator Diane Feinstein requested that the DOJ "consider" the USDA's request for dismissal. Ex. G-28.

None of the Congressional contacts threatened to take action adverse to the USDA or the DOJ. *See D.C. Federation of Civil Ass'ns v. Volpe,* 459 F.2d 1231, 1246-47 (D.C. Cir. 1971), *cert denied,* 405 U.S. 1030 (1972). In *D.C. Federation* Representative Natcher publicly stated that unless the Secretary of Transportation approved a proposed bridge, money earmarked for the construction of the District of Columbia's subway system would be withheld. There were no threats to hold USDA or DOJ funding "hostage," nor were any other retributive consequences mentioned.

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The cases cited by the relators are distinguishable. In *S.E.C. v. Wheeling-Pittsburgh Steel Corp.*, 648 F.2d 118, 125-28 (3rd Cir. 1981), the court found it an abuse of process for an agency to issue a subpoena based upon improper congressional pressure and without an objective determination by the agency. Here, there is no evidence of improper pressure or that the USDA and DOJ failed to make independent determinations that dismissal was justified. In *Pillsbury Co. v. F.T.C.*, 354 F.2d 952 (5th Cir. 1966), the court found intense questioning by a Senate subcommittee of FTC officials about a case pending before the agency created an appearance of partiality and deprived the corporation involved of due process. Relators and their allies exerted vigorous pressure on the USDA, DOJ, and Congress persons, advocating that the cases not be dismissed. No evidence establishes that the conduct of any legislator crossed the line of fair advocacy.

This case is analogous to *Sierra Club v. Costle*, in which Senator Byrd met with officials from the Environmental Protection Agency to "express 'strongly' " his view that proposed regulations would adversely affect his constituents. 657 F.2d 298, 408 (D.C. Cir. 1981). There, the only evidence of extraneous pressure was a newspaper article stating that Senator Byrd "hint[ed]" that the President needed his support on other matters pending before Congress. *Id.* at n.539. The D.C. Circuit found such evidence too insubstantial to warrant a finding of unlawful congressional interference. *Id.*

Relators proffer letters from Sunkist Vice-President William K. Quarles thanking several members of Congress for "the major successful effort . . . made to influence the DOJ to file the motions to dismiss the [FCA] cases." Ex. R-167. Mr. Quarles was aware of letters and phone conversations between

members of Congress and the USDA and DOJ, but he did not know the content of those communications.[31] Quarles, at 676-79. Since Quarles did not know the substance of the Congressional contacts, it cannot reasonably be inferred from his reference in the letter to the term "influence," that any member of Congress applied undue or improper pressure. The officials who actually spoke with members of Congress testified that there was no Congressional use of undue influence. Rominger, at 210.

Relators implicitly suggest the government's decision was motivated by improper influence because Sunkist, and the law firm representing the packinghouse defendants, Baker Manock & Jensen, made contributions to the political campaigns of Democratic members of Congress totalling $170,000 over the last 15 years. However, relators do not argue that the political contributions were illegal. Contributing to political compaigns is protected by the First Amendment. *Buckley v. Vallejo,* 424 U.S. 1, 58 (1976). That some of the defendants and their counsel have made political contributions does not amount to undue or improper influence. No link between any contribution and the requested dismissal was established.

The relators have failed to show that the decision to seek dismissal resulted from improper influence or illegal pressure.

3. Dismissal Is Not Arbitrary Or Capricious.

Relators raise several arguments in support of their claim the government's decision to dismiss is arbitrary. None of these

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31. In fact, Mr. Quarles testified that he did not know whether several of the Senators or Representatives that he thanked actually contacted the DOJ. Quarles, at 676-79. He stated that he thanked everybody who "may have been interested" because "politicians love to be thanked." Quarles, at 679:23-25.

arguments are persuasive. Relators contend the government acted arbitrarily by failing to consider reasonable alternatives; i.e., the government should have chosen one of two "less draconian" alternatives to dismissal: (1) cure the *Sunny Cove* procedural deficiencies in the 1984 marketing orders; or (2) amend the AMAA cases to state FCA claims.[32]

The USDA considered the first alternative but rejected it for two reasons: (1) it believed it could not properly address a tendency finding made 10 years ago, and (2) it was concerned that an attempt to address the negative tendency finding would spawn even more litigation. Clayton, at 77-78; Rominger, at 199-200. Nor can relators force the USDA to undertake a quasi-rulemaking proceeding to reverse the 1984 tendency finding. *E.g., American Horse Protection Ass'n. v. Lyng*, 812 F.2d 1, 7 (D.C. Cir. 1987).

The USDA also declined the second alternative, amending its AMAA cases to state FCA claims, because the DOJ contends the FCA does not apply. Rominger, at 201, 212-13. FCA penalties sought by relators were excessive and not related to the amounts gained by violators which were the amounts of penalties sought by USDA under the AMAA.[33] The government is not required to choose the best or least intrusive alternative, so long as its decision is rational. *Vermouth v. Corrothers*, 827

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32. Relators and the government agree that FCA claims premised on AMAA violations survive even if the underlying marketing orders are invalid.

33. Congress eliminated a treble damages provision of the Agricultural Act of 1961. S. Rep. No. 566, 87th Cong., (1st Sess. (1961), *reprinted in* 1961 U.S.C.C.A. No. 2243. No AMAA treble damages penalty has since been enacted.

F.2d 599, 603 (9th Cir. 1987). Although the government rejected alternatives that relators prefer, its grounds for dismissal are legitimate, which is sufficient.

Relators claim the USDA has arbitrarily abandoned its policy of strictly enforcing prorate. USDA in the past undertook to fully investigate and prosecute AMAA violations through operation Fair Enforcement. See Exs. R-22, R-27, R-45. Relators say it is capricious for the government to reverse its enforcement policy and pursue amnesty for all prorate cheaters. However, when the circumstances change, the government is free to change its policies concerning the management and prosecution of its own litigation and implementation and enforcement of laws and regulations it administers. The decision to grant amnesty is a political one related to farm policy. U.S. Const. Art. II, § 2. An agency's decision not to prosecute or enforce, by criminal or civil means, is a decision generally committed to an agency's absolute discretion. *Heckler v. Chaney,* 105 S.Ct. 1649, 1655 (1985). One remedy for relators and others who disagree with the executive's political decision, and the legislators who supported it, is to exercise their electoral franchise.

Here, the government changed its policy in response to the *Sunny Cove* decision, its failed attempts to settle the FCA and AMAA cases, and a perceived inability to cure unlawful marketing orders. It decided that general amnesty was preferable to prosecution under the FCA, which threatened to bankrupt part of the industry through the imposition of penalties greatly in excess of relief obtainable under the AMAA. Although the government changed its policy, it did so on the basis of rational government interests. Under the standard of review for dismissal of FCA cases, as well as decision-making

under the APA, the government does not act arbitrarily when it provides a reasoned explanation for its change of policy. *See Association of Data Processing v. Board of Governors,* 745 F.2d 677, 683 (D.C. Cir. 1984) (agency action arbitrary and capricious when "it is an abrupt and *unexplained* departure from agency precedent") (emphasis added). Here, the decision was made only after input to the USDA and DOJ from all concerned.

Relators argue no new facts were presented to the USDA between May 16, 1994, when it announced its decision to withdraw from the FCA cases, and May 20, 1994, when the USDA asked the DOJ to consider dismissing the FCA cases. Relators claim USDA's request on May 20 was a "reversal" of its previous policy to withdraw from the FCA cases and allow the relators to proceed.

Deputy Secretary Rominger testified that the USDA would have sought dismissal of the FCA cases on May 16, had it been aware of the government's right to do so under § 3730(c)(2)(A). Rominger, at 206:10-14, 239:14-18. He stated that the USDA's intent on May 16, 1994, was "to dismiss all of the litigation that [the USDA] possibly could." Rominger, at 206:13-14. When the USDA became aware of the possibility that § 3730(c)(2)(A) authorized dismissal of the FCA cases, it promptly requested that the DOJ consider dismissing these cases, since dismissal would further the USDA's stated objectives in the May 16, 1994, announcement. Golden, at 659:1-6.

Relators have not demonstrated that the government's reasons underlying the motion to dismiss are arbitrary or capricious.

4. Improper Considerations Of Relators' Status.

Relators claim dismissal was based on the following improper factors pertaining to their "status": (1) that they are competitors of the defendants; (2) that Sequoia has challenged the regulations they now seek to enforce; (3) that Sequoia is trying to des troy Sunkist; (4) that Sequoia is an alleged violator of prorate; (5) that relators are trying to obtain a competitive advantage over defendants.

Relators have not met their burden of showing that these factors actually motivated the government's decision to dismiss. The only evidence that any of such factors were considered by the government is a letter from Assistant Attorney General Hunger responding to three members of Congress who wrote the DOJ to express their support for dismissal of the FCA cases. The letter stated:

> If granted, we hope the Motion to Dismiss, made at the urging of the Department of Agriculture, and supported by an affidavit of the Deputy Secretary of Agriculture, will effectuate USDA policy, ensure fairness in DOJ's enforcement proceedings, and end the anomolous situation whereby one member of an industry is obtaining a competitive advantage by selectively enforcing regulations (which the company itself has challenged) against certain competitors.

See Exs. G-46, G-47, G-48. The letter describes "an anomalous situation" not that the decision was based on such factors. Government officials who testified at the evidentiary hearing denied that Sequoia's status as an industry competitor or alleged

prorate cheater was a basis for dismissal. See Clayton, at 105-06; Rominger, at 241-42.

When deciding whether to intervene in or dismiss an FCA case, the government may properly consider factors bearing upon the relators' suitability or incentive to prosecute the case. Such factors may involve status as it relates to motivation and competence to sue under the FCA. For example, as competitors of the defendants, relators have an incentive to seek damages and maximum penalties that could bankrupt defendants and provide relators an advantage by eliminating competing industry members. This could lead relators to prosecute the cases in a manner inconsistent with the government's interest under the AMAA to preserve the economic integrity of the citrus industry. There was evidence that Sequoia challenged the AMAA regulations under which it was sued by the government. There was evidence that a Sequoia principal, Mr. Pescosolido, admitted Sequoia engaged in prorate cheating. Evans dep. at 48-50. Consideration of the relators, motives is not inappropriate. There is no evidence that improper status considerations motivated the decision to dismiss.

5. Dismissal Of The Lemon Cases Is Not Irrational.

Relators assert, first, the lemon order did not suffer from the legal deficiencies identified in the *Sunny Cove* decision, no negative tendency finding had to be reversed to preserve the lemon order's validity. Second, the lemon industry did not demonstrate the degree of divisiveness existing in the navel and valencia orange industries, although there were some handlers, such as Sequoia, who voiced opposition to the use of prorate for lemons. Clayton, at 147-48; Rominger, at 270-71. Third, the USDA did not solicit amendments to the lemon order.

Appendix B

Although only four FCA cases were pending in the lemon industry at the time DOJ sought dismissal, the USDA was investigating other lemon handlers for prorate violations and officials perceived lemons and oranges were on "equal footing" because lemon prorate violations were comparable to prorate cheating in oranges and potentially as pervasive. Clayton, at 146-147, Golden, at 652-654, Lewis, at 316. To preserve the financial stability of the lemon industry, the USDA rationally believed, for the same reasons it sought to dismiss the orange cases, that it was necessary to dismiss the lemon cases. This decision is supported by substantial evidence.

III

CONCLUSION

These FCA cases arise from a chapter of federal farm policy history of which no one can be proud. The USDA permitted adoption and continuation of restrictive flow to market rules that were advocated by a dominant citrus cooperative (Sunkist), and its supporters, which caused industry-wide cheating and law violations. Unbridled economic self-interest drove citrus industry members to ignore and violate with impunity regulations they caused to be enacted. These extremes of lawless conduct culminated in a chaotic regulatory environment in which lawbreakers profited while law-abiding industry members lost profits and market share. In response the USDA first instituted AMAA enforcement, then suspended prorate, and sought global settlements. After failed settlement efforts and invalidation of the orange marketing orders, USDA terminated all the disputed marketing orders, dismissed all AMAA enforcement litigation, and now seeks to dismiss all FCA cases to "wipe the slate clean." Although relators view

this as a loss of political will, the United States has advanced legitimate government interests to justify its decision.

Ultimately the decision on this motion is compelled under the Constitutional doctrine of separation of powers, which precludes the judiciary from interfering with political choices made by the Executive in the exercise of prosecutorial discretion. The FCA does not give relators the power to dictate federal government policy in the area of agricultural regulation or to decide whether amnesty for fraud on the government should be withheld. Those discretionary political decisions reside with the Executive, in discharge of its duties under the AMAA, as authorized by the legislature. Nor does the FCA authorize the judiciary to substitute the court's judgment for that of the Executive Branch, as to what is in the best interests of the citrus industry or the United States Treasury. It is the Executive Branch which is vested with constitutional authority to execute and enforce the law. U.S. Const., Art. II, § 3.

In addressing these motions, the Court's function is limited to determining whether the decision to dismiss these FCA cases is based upon one or more legitimate government interests which will be advanced by dismissal, is not arbitrary and capricious, fraudulent, or illegal. The ultimate choice to forego prosecution of the law breakers is political, vested in the Executive Branch, which possesses the power to grant amnesty.

The Executive has decided continued prosecution of these cases will perpetuate industry divisiveness, inhibit the AMAA regulatory environment in the Arizona-California citrus industry, prevent industry cooperation to achieve orderly markets, impede the development of distribution processes, destroy the economic health of part of the industry, bankrupt

members, and thereby damage the national economic interest. USDA reached the judgment that amnesty serves to facilitate adoption of new marketing orders, conserve industry and government resources, and achieve equity among all industry law violators. USDA and DOJ determined all these interests outweigh the benefits of a potential recovery for the federal treasury and the *in terrorem* effect of vigorous law enforcement under the AMAA. Dismissal is rationally related to accomplishment of these legitimate government interests. The DOJ independently exercised its discretion to determine that these FCA cases do not serve the public interest.

Potential consequences of dismissal are a loss of public confidence in the government's fair and even-handed enforcement of the law and precedent that could weaken the incentive of relators to pursue FCA cases. Neither consequence is ineluctably compelled. It is unlikely that the unique circumstances underlying these cases will reoccur and the risk of deterring future *qui tam* cases is miminal. If such conditions arise again, correction of the problem lies with Congress and the Executive.

Relators complain that they cannot match Sunkist's political access, tax and antitrust immune status, and bloc voting power granted by law. Congress has vested agricultural co-operative corporations with unique advantages to advance the economic well-being of agricultural industries and their members. Where, as here, the protected entity utilizes its strength to facilitate passage of rules which harm rather than help an industry, resulting in industry-wide cheating and law-breaking, the Executive may act, and has done so, to terminate the regulations to send a message that unfair or unworkable rules will not be perpetuated. If co-ops are

disserving the public interest, the legislature may reexamine the wisdom of the underlying statutory scheme that grants co-ops special powers.

Once the dismissal of these FCA cases is determined, as it has been, to be for valid governmental purposes, which are not arbitrary and capricious, not the product of fraud or improper political influence, the Court's power to deny the dismissal motion is exhausted and deference to the Executive's decision required. What the court thinks of the merits of the decision to dismiss these cases, right or wrong, whether law breakers should be held accountable; whether the reasons advanced are persuasive, or the ultimate consequences fair or unfair, matters not, for the court lacks the power to substitute its judgment for that of the Executive.

The motion to dismiss all these pending FCA cases is GRANTED, with prejudice. In the exercise of the court's discretion, in view of the novelty and difficulty of the issues presented, each party shall bear its own costs and attorneys fees. The United States shall prepare a judgment of dismissal in conformity with this opinion and lodge it with the court within five (5) days following the date of service of this opinion.

SO ORDERED.

DATED: September 26, 1995.

s/ Oliver W. Wanger
Oliver M. Wanger
UNITED STATES DISTRICT JUDGE

APPENDIX C — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES COURT FOR THE EASTERN DISTRICT OF CALIFORNIA RE: UNITED STATES' MOTION TO DISMISS FILED MARCH 3, 1995

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CV-F-88-566-OWW

UNITED STATES ex rel. SEQUOIA ORANGE COMPANY,

Plaintiff,

v.

SUNLAND PACKING HOUSE COMPANY,

Defendants.

CV-F-89-002
Consolidated with

CV-F-89-004
CV-F-89-006
CV-F-89-007
CV-F-89-008
CV-F-89-012
CV-F-89-013
CV-F-89-014

UNITED STATES ex rel. SEQUOIA ORANGE COMPANY,

Plaintiff,

v.

SAN JOAQUIN CITRUS, and SUNKIST GROWERS, INC.,

Defendants.

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CV-F-89-050
Consolidated with
CV-F-89-051
CV-F-89-052
CV-F-89-053
CV-F-89-054
CV-F-89-055
CV-F-89-056
CV-F-89-057
CV-F-89-058
CV-F-89-059
CV-F-89-060
CV-F-89-061
CV-F-89-062

UNITED STATES ex rel. SEQUOIA ORANGE COMPANY,

Plaintiff,

v.

BAIRD-NEECE PACKING CORP., and SUNKIST GROWERS, INC.,

Defendants.

CV-F-91-194-OWW

UNITED STATES ex rel. SEQUOIA ORANGE COMPANY,

Plaintiff,

v.

OXNARD LEMON COMPANY, et al.,

Defendants.

Appendix C

CV-F-91-195

UNITED STATES ex rel. SEQUOIA ORANGE COMPANY,

Plaintiff,

v.

MISSION CITRUS COMPANY, et al.,

Defendants.

CV-F-91-196

UNITED STATES ex rel. SEQUOIA ORANGE COMPANY,

Plaintiff,

v.

VENTURA PACIFIC COMPANY, et al.,

Defendants.

CV-F-91-197

UNITED STATES ex rel. SEQUOIA ORANGE COMPANY,

Plaintiff,

v.

SATICOY LEMON ASSOCIATION, et al.,

Defendants.

Appendix C

CV-F-93-5016-OWW

UNITED STATES ex rel. LISLE BABCOCK,

Plaintiff,

v.

DOLE CITRUS, INC.,

Defendant.

CV-F-91-195

UNITED STATES ex rel. SEQUOIA ORANGE COMPANY,

Plaintiff,

v.

MISSION CITRUS COMPANY, et al.,

Defendants.

CV-F-91-196

UNITED STATES ex rel. SEQUOIA ORANGE COMPANY,

Plaintiff,

v.

VENTURA PACIFIC COMPANY, et al.,

Defendants.

Appendix C

CV-F-91-197

UNITED STATES ex rel. SEQUOIA ORANGE COMPANY,

Plaintiff,

v.

SATICOY LEMON ASSOCIATION, et al.,

Defendants.

MEMORANDUM OPINION & ORDER
RE: UNITED STATES' MOTION TO DISMISS

I. BACKGROUND

This case presents a question of first impression: Under what circumstances may the United States dismiss a facially meritorious False Claims Act claim over the opposition of the relator. The United States ("Government") moves to dismiss all of the claims brought by Sequoia Orange Company ("Sequoia")[1] under the False Claims Act ("FCA") against various citrus packing houses. The Government brings these motions under 31 U.S.C. § 3730(c)(2)(A).

The Government also brought suits against many of the defendants in these cases for violations of the Agricultural Marketing Agreement Act 1937, 7 U.S.C. § 601, et seq. ("AMAA"). It has dismissed or now seeks to dismiss all AMAA claims against defendants which were handlers of citrus, primarily Valencia oranges and lemons.

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1. The Government is also moving to dismiss cases in which Lisle Babcock is the realtor. For the sake of simplicity, Sequoia is used to refer to both Sequoia Orange Company and Lisle Babcock.

Appendix C

The history of these cases is complicated because of the number of parties and the length of time the cases have existed. Not all of the parties are situated identically. However, with one exception,[2] these distinctions are irrelevant. The issue presented by this motion is the same in each case; the Government filed an omnibus brief for all of the cases and Sequoia has filed a single response.

Sequoia filed the first of these cases in December of 1988. Its claims against the defendants are premised upon violations of the AMAA. Under the AMAA, the Secretary of the Department of Agriculture is authorized to issue marketing orders regulating the sale of various commodities, including oranges and lemons. *See Cecelia Packing v. USDA,* 10 F.3d 616 (9th Cir. 1993), *cert. denied,* 114 S. Ct. 1125 (1994). Marketing orders limit the quantity of a particular commodity that may be marketed by handlers. 7 U.S.C. § 608c. Handlers who exceed their allotment are subject to civil fines. § 608c(14). Sequoia alleges that the defendants exceeded their marketing quotas and reported false information to the Department of Agriculture in order to avoid the penalties for violation of the marketing orders and to avoid paying assessments on unreported fruit.

The Government was initially hostile to Sequoia's suits. It moved to dismiss the claims on the ground that there was no

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2. The cases involving the four lemon defendants, Ventura Pacific, Saticoy Lemon Association, Oxnard Lemon Company, and Mission Citrus Company, differ from the orange cases in that the Government elected to proceed with these cases during the initial sixty day period (which was extended, for good cause). §3730(b)(4)(A). Sequoia's argument that the Government's dismissal power is limited when it intervenes at a later date, under §3730(c)(3), does not apply to the lemon defendants. Likewise, Sequoia's claim that the Government is judicially estopped from seeking dismissal does not apply to these defendants.

jurisdiction under the FCA to enforce liability for false statements made in connection with the AMAA because, a reverse false claim of the type alleged was not actionable under the FCA. The court denied this motion on July 5, 1989. A similar motion was brought by the defendants and was denied on July 25, 1990.

After the case had been pending for over four years the Government moved to intervene as plaintiff under 31 U.S.C. § 3730(c)(3). Sequoia opposed intervention because the Government earlier took the position the FCA claims were legally insufficient. The Government argued it should intervene to facilitate a global settlement of all the FCA and AMAA cases arising out of the citrus marketing orders, representing to the Court, that, if necessary, it would litigate the FCA claims despite the fact that it believed there was no liability.[3] The Government has always maintained that its AMAA claims are meritorious. On September 9, 1993, Government intervention was permitted for good cause. No settlement has been reached in these cases. The Government now seeks to dismiss the FCA claims.

II. DISCUSSION

This motion presents two issues. First, what standard of review, if any, applies to the Government's motion to dismiss. Second, has the Government satisfied that standard. In its opening brief, the Government asserts that "but for affording the relator an opportunity for a hearing, the right to dismiss is unconditional." (Govt's Brief at 6-7.)) Essentially, the Government contends that the Court has no power to review

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3. The Government reserved its right to challenge the validity of Sequoia's FCA claims on appeal.

its decision to dismiss the cases. Nevertheless, the Government asserts that under any standard of review it has presented a sufficient basis for dismissal.

A. *False Claims Act*

The Supreme Court has repeatedly stated that the "chief purpose" of the False Claims Act is "to provide for restitution to the government of money taken from it by fraud." *United States v. Bornstein,* 423 U.S. 303, 314 (1976) (quoting *United States ex rel Marcus v. Hess,* 317 U.S. 537, 551-52 (1943)); *Rainwater v. United* States, 356 U.S. 590, 592 (1958) ("It seems quite clear that the objective of Congress was broadly to protect the funds and property of the Government from fraudulent claims . . ."). Congress included the remedy of double damages and fines "to make sure that the government would be made completely whole." *Bornstein,* 423 U.S. at 314-15. The FCA also serves to deter and to punish fraud against the government. *United States v. McLeod,* 721 F.2d 282, 285 (9th Cir. 1983); *In re Commonwealth Companies, Inc.,* 913 F.2d 518, 526 (8th Cir. 1990).

Congress included the *qui tam* provisions in the FCA for several reasons. First, it was recognized that the government could not itself detect all of the fraud perpetrated against it. The *qui tam* provisions encourage private citizens possessing information about fraud on the government to provide that information to the government. *United States ex rel. La Valley v. First Nat'l Bank,* 707 F. Supp. 1351, 1355 (D. Mass. 1988) ("The legislative history in both houses of Congress reveals a sense that fraud against the Government was apparently so rampant and difficult to identify that the Government could use all the help it could get from private citizens with knowledge

of fraud."); see also 31 U.S.C. §3730(d) (providing an award, in the amount of a percentage of the government's recovery, to persons providing information regarding false claims); § 3730(h) (protecting informants who provide information regarding fraud by their employers from retaliation by the employer).

Second, the Government has limited resources and cannot pursue every case in which it appears the Government has been defrauded. In the event that the Department of Justice decides not to prosecute a case initiated by the relator, Congress provided that the relator could proceed with the case in the name of the United States. A further reason for permitting the relator to sue on behalf of the government was the concern that the Executive Branch did not have the political will to prosecute certain cases. One circuit has noted that the 1986 amendments to the FCA expanded the *qui tam* provisions to "encourage more private enforcement suits." *United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493, 1497 (11th Cir. 1991) (citing 1986 U.S. Code Cong. & Admin. News at 5288).

B. *Standard of Review*

Section 3730(c)(2)(A) states that "(t)he Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion." The statute is silent as to what standard of review should be applied to dismissal. The Government maintains that the Court has no authority to review a motion to dismiss under § 3730(c)(2)(A), or that review is limited to excluding abuse of prosecutorial discretion. Sequoia argues that no meritorious

FCA claims should be dismissed. Alternatively, either the Fed.R.Civ.P Rule 41(a) standard of prejudice applies, or the FCA § 3730(c)(2)(B) "fair, adequate and reasonable under all the circumstances" standard of review for approving settlements should be applied to dismissals.

1. *The Government's Late Intervention Does Not Prohibit It From Moving For Dismissal.*

Initially, Sequoia asserts that the Government cannot move to dismiss because it did not intervene at the beginning of the case. The Government has an unrestricted right to intervene within 60 days (plus extensions for good cause) from the date that a relator files a FCA claim. 31 U.S.C. § 3730(b)(2). If the Government elects to proceed with the case, then it has "the primary responsibility for prosecuting the action," though relator retains "the right to continue as a party to the action," subject to certain limitations. § 3730(c)(1) . If the Government declines to intervene then the relator is entitled to prosecute the case. § 3730(c)(3). However, even if the Government declines to intervene during the initial 60 day period, "the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause." *Id.*

Sequoia relies upon section 3730(c)(3) for the proposition that the Government's superior right to manage and control the litigation, provided in 3730(c)(2), only exists if the Government intervenes within the initial 60 day period. This interpretation of the *qui tam* provisions was rejected by the Ninth Circuit. "When the Government intervenes late in the action, a fair interpretation of the statute is that the Government has a similar degree of control over the litigation as if it had

intervened at the start." *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 752 & n.8 (9th. Cir. 1993), *cert. denied*, 114 S. Ct. 1125 (1994). This includes the right to move for dismissal under § 3730(c)(2)(A) . The *Kelly* opinion notes that this interpretation assures the constitutionality of the *qui tam* provisions. *Id.* Sequoia's interpretation, under which the Government forfeits its right to manage the case if it does not intervene at the beginning, raises significant concern over separation of powers. It impairs the Government's right to intervene. Although the Government intervened late in these cases, pursuant to the good cause provision of section 3730(c)(3), it retains the right to move for dismissal.

2. *The Government Is Not Barred From Moving For Dismissal By Estoppel or Laches.*

Sequoia contends the Government is barred from dismissing this case by the doctrine of judicial estoppel. "As a general principle, the doctrine of judicial estoppel bars a party from taking inconsistent legal positions in the same litigation." *Morris v. California*, 966 F.2d 448, 452 (9th Cir. 1991), *cert. denied*, 113 S. Ct. 96 (1992). "The purpose of the doctrine is to protect the integrity of the judicial process" and to prevent parties from playing "fast and loose." *Id.* at 433. It is "an equitable doctrine invoked by the court at its discretion." *Id.* (quoting *Russel v. Rolfs*, 893 F.2d 1033, 1637 (9th Cir. 1990), *cert. denied*, 501 U.S. 1260 (1991)).

According to Sequoia, the Government has taken inconsistent positions with regard to its duty to prosecute the FCA claims against Defendants. At the August 9, 1993, hearing on the Government's motion to intervene in these cases, counsel for the Government stated that the Government would diligently

prosecute Sequoia's FCA claims. On the basis of this representation, the Court found good cause to permit intervention under § 3730(c)(3). The Government now seeks dismissal, which Sequoia maintains is a breach of the prior "commitment" to prosecute the FCA claims. The Government responds that the doctrine of judicial estoppel prohibits a party from taking inconsistent "legal" positions. It contends that it did not take a "legal" position when it represented to the Court that it would diligently pursue the FCA claims.

Whether the Government's commitment to pursue Sequoia's FCA claims is characterized as a "legal" position or not, it does not bar the Government from seeking dismissal. The Government states its prior commitment was made in good faith and not to manipulate the judicial process. It contends that its policy regarding its cases has changed in response to several events following intervention, including the decision in *United States v. Sunny Cove Citrus Ass'n*, 854 F. Supp. 669 (E.D. Cal. 1994), which found invalid Navel and Valencia orange marketing order amendments. Moreover, the Government could have brought this motion to dismiss even if it had not intervened in the case. *Juliano v. Federal Asset Disposition Ass'n*, 736 F. Supp. 348, 349 (D.D.C. 1990), *aff'd*, 959 F.2d 1101 (D.C. Cir. 1991) (cited with approval by *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 753 n.10 (9th Cir. 1993)); *see also United States ex rel. Killingsworth v. Northrop Corp.*, 25 F.3d 715, 724 (9th Cir. 1994) (Government can oppose settlement for good cause without intervening in the case). The Government is not playing "fast and loose" with the judicial process by now seeking dismissal under what it describes as changed industry conditions. Equity would not be served by use of judicial estoppel to bar the Government from changing its position to bring this motion to dismiss; for to do

so would be to foreclose any litigant from changing its decisions to pursue a case, no matter how circumstances have changed.

3. *Rule 41(a)(2) Does Not Prevent Dismissal.*

Federal Rules of Civil Procedure Rule 41(a)(2) states, "except as provided in paragraph (1) of this subdivision of this rule [permitting dismissal by plaintiff prior to defendant's answer, a motion for summary judgment, or by stipulation], an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper.". "A motion for voluntary dismissal under Rule 41(a)(2) is addressed to the district court's sound discretion." *Stevedoring Serys. of Am. v. Armilla Int'l,* 889 F.2d 919, 921 (9th Cir. 1989). In exercising its discretion, the Court must consider whether the defendant will suffer legal prejudice from dismissal. *Hamilton v. Firestone Tire & Rubber Co.,* 679 F.2d 143, 145 (9th Cir. 1982). The Court may condition the dismissal on terms that it deems proper, or that are necessary to avoid prejudice to the defendant. *See Koch v. Hankins,* 8 F.3d 650, 652 (9th Cir. 1993).

Sequoia argues that the Government's motion to dismiss should be reviewed according to the "prejudice" standard of Rule 41(a)(2). However, Sequoia cites no authority for the proposition that Rule 41(a)(2) applies when dismissal is sought under a specific statute granting dismissal authority. Where two statutes are inconsistent, generally, the more specific statute prevails. *Hellon & Assocs., Inc. v. Phoenix Resort Corp.,* 958 F.2d 295, 297 (9th Cir. 1992).

Under a Rule 41(a)(2) prejudice standard, Sequoia contends its rights will be prejudiced. In particular, Sequoia maintains

that dismissal will deprive it of the "bounty" it would receive under § 3730 if the Government obtains a judgment or settlement in this case. However, Sequoia does not have a vested property right in the bounty it could receive in these cases, because its rights in the litigation are subject to the Government's power to dismiss the case. Whether or not this particular motion to dismiss is proper, that the Government possesses the power to dismiss FCA claims refutes Sequoia's claim to a vested property right in the potential bounty. Even if Sequoia had a protectable property interest in this litigation, Rule 41 (a) (2) protects the rights of defendants, not plaintiffs. No authority is cited for the proposition that the Court should consider prejudice to one of the plaintiffs when ruling on a motion for voluntary dismissal. *See Cross-Westchester Dev. Corp. v. Chiulli,* 887 F.2d 431, 431 (2d Cir. 1989) ("The purpose of authorizing terms and conditions on a voluntary dismissal is to protect the defendant from prejudice."); *McCall-Bey v. Franzen,* 777 F.2d 1178, 1184 (7th Cir. 1985) (finding no cases in which "the order of dismissal imposed conditions in the plaintiff's favor.").

4. *The Government May Dismiss Meritorious FCA Suits.*

Sequoia's next argument is that the Government may only dismiss a false claims case it shows to be objectively meritless. Under this interpretation, the appropriate standard of review would be either the standards for a Fed.R.Civ.P. Rule 12(b)(6) motion or a motion for summary judgment.

Limiting the Government's power of dismissal to objectively meritless cases would give relators power that belongs to the Executive Branch. The Executive Branch retains the ultimate authority to determine whether an FCA prosecution

should be terminated because it conflicts with other legitimate governmental interests. A rule prohibiting dismissal of meritorious cases would significantly undermine the Government's prosecutorial discretion and would violate separation of powers. *See Juliano v. Federal Asset Disposition Ass'n*, 736 F. Supp. 348, 351 (D.D.C. 1990), *aff'd*, 959 F.2d 1101 (D.C. Cir. 1991) ("The court will not assume that the qui tam provisions of the [FCA] were intended to curtail the prosecutorial discretion of the Attorney General.") (cited with approval by *United States ex rel. Killingsworth v. Northrop Corp.*, 25 F.3d 715, 724 (9th Cir. 1994)).

5. *Standards for Dismissal and Settlement Are Not the Same*

Sequoia contends the court should review motions to dismiss under the settlement standard of review. § 3730(c)(2)(B) ("The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances.").

This argument is based upon the rule of statutory construction that in general, one provision of a statute should not be interpreted in such a way as to make another provision unnecessary. *Pennsylvania Dept. of Public Welfare v. Davenport*, 495 U.S. 552, 562 (1990) (expressing "a deep reluctance to interpret a statutory provision so as to render superfluous other provisions of the same enactment.") Sequoia contends that interpreting the FCA to provide a standard of review for dismissals that is lower than the standard for settlements will render the settlement provision superfluous. If the Government wished to settle a case on terms that were

not "fair, adequate and reasonable" it could do so by threatening dismissal. Sequoia also urges that dismissal should be treated as a settlement for zero dollars. It maintains that a "zero dollar settlement" should receive even greater scrutiny than a settlement for a larger sum.

Sequoia's argument is not justified by the statute. If FCA motions to dismiss are treated the same as settlements, then the dismissal provision becomes superfluous. Congress must have intended to treat settlements and dismissals differently as it enacted separate provisions for each, and, provided an express standard for settlement review. It is evident Congress knows how to prescribe standards of review for settlement and dismissal, but chose to treat government dismissal of FCA cases differently by omitting to provide a review standard. *C.f.* Fed.R.Civ.P. Rule 23(e) (providing a single standard of review for dismissal or compromise of class action lawsuits). Sequoia's interpretation would eliminate the distinction Congress made between FCA settlements and dismissals and render the FCA dismissal provision a dead letter.

Sequoia's argument further ignores another principle of statutory interpretation, namely that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *INS v. Caroza-Fonseca,* 480 U.S. 421, 432 (1987); *West Coast Truck Lines, Inc. v. Arcata Copmuni Recycling Center, Inc.,* 846 F.2d 1239, 1244 (9th Cir.), *cert. denied*, 488 U.S. 856 (1988). Here, Congress included the language "fair, adequate and reasonable" in the settlement provision but not in the dismissal provision. No authority is cited to establish that the exclusion of this language from the dismissal provision was not intentional.

In other contexts, Congress has explicitly provided a single standard of review for dismissal and settlement. For example, Fed.R.Civ.P. Rule 23(e) provides that "a class action shall not be *dismissed or compromised* without the approval of the court." This rule has been interpreted to require that class action settlements or dismissals be "fair and reasonable" to all class members.[4] *See* 7B Charles A. Wright, et al., Federal Practice and Procedure § 1797.1, at 378-79 (1986). Congress could have chosen to create a uniform standard for settlement and dismissal of FCA cases as well, but chose not to do so.

Sequoia's argument that judicial review of settlement and dismissal should be treated identically, even though Congress has explicitly enacted the same standard for each, has been rejected in the antitrust law context. Portions of the Tunney Act codified at 15 U.S.C. § 16(b)-(f), require the court to make a public interest determination before entering any consent judgment proposed by the Government in an antitrust case. In *In re Int'l Business Machines Corp.*, 687 F.2d 591, 603 (2nd Cir. 1982), it was argued that this standard should also apply when the Government proposes to dismiss an antitrust case pursuant to Fed. R. Civ. P. Rule 41 (a). The Court rejected this argument, holding that "absent some indication that Congress intended the Tunney Act to apply to dismissals, we must conclude that it does not apply." *Id.* at 603; see also *United*

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4. The legislative history to the 1986 Amendments to the FCA indicates Congress intended the standard of review for FCA settlements to mirror the standard of review for dismissal and compromise of class actions. "While the law enables the Government to enter into a settlement with the defendant, it does require Court review of that settlement to determine whether it is fair, adequate and reasonable under all the circumstances, the same test that courts now apply to the settlement of class action claims." 132 Cong. Rec. H. 9382 (October 7, 1986).

Appendix C

States v. Mercedes-Benz of North America, 547 F. Supp. 399, 401 (N.D. Cal. 1982). Similar arguments were addressed in *Mercedes-Benz:*

> It seem illogical that Congress has required protective procedures for consent decrees, where the government presumably has obtained some of the relief originally sought, but no procedural safeguards are required for dismissals, where no relief at all was obtained. Both practices can be subject to similar abuses. However, it is up to Congress to correct the abuses.

Mercedes-Benz, 547 F. Supp. at 401. The "fair, reasonable, and adequate under all circumstances" standard of review for FCA settlements does not apply to this motion to dismiss.

6. *The Dismissal Power Is Not Unrestricted Or Unreviewable.*

The Government argues that the dismissal provision "plainly gives the government the plenary authority to dismiss qui tam law suits as it sees fit." This interpretation renders meaningless the words "hearing on the motion." If the Government's prerogative to dismiss *qui tam* cases is absolute, there is no need for a hearing to review the exercise of an absolute right of dismissal. The government suggests the "hearing" is only to "verify that the relator received notice of the motion" and to allow the relator man opportunity to air his views." (Govt's Brief at 7.)

This interpretation of "hearing" is at odds with the ordinary definition of that term. "Where Congress uses terms that have a settled meaning under . . . common law, a court must infer,

unless the statute otherwise dictates, that Congress meant to incorporate the established meaning of these terms." *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981). Black's Law Dictionary defines "hearing" as a "[p]roceeding of relative of formality generally public, with definite issues of fact or law to be tried." The Government interprets § 3730 to provide for a "hearing" at which there are no issues of fact or law to be determined. The result of the motion is preordained. No precedent is cited which interprets statutory language providing for a "hearing on the motion" to require that the court grant the motion irrespective of the objections raised. In such a "hearing" the court has no function other than to ministerially grant dismissal. The plain language of § 3730(c)(2)(A) refutes the Government's position that this motion for dismissal is unreviewable.

Nor does the legislative history of the 1986 FCA amendments does not support the Government's interpretation of § 3730 (c) (2) (A). The legislative history is replete with evidence of Congressional intent to enhance the status and rights of the relator in qui tam actions. An unrestricted right in the Government to dismiss is inconsistent with this intent. Legislative history to the final version of the bill includes:

1.Role of the Party

> The final version of the Bill preserves and strengthens the role of the person initiating the action even if the government enters the case. The law makes clear that this person ("qui tam" plaintiff) will be a "party" to the action with all the rights and responsibilities that a party receives under the Federal Rules of Civil Procedure. The Court may

> impose some limitations on the party's full participation only if the Government meets its burden of establishing that the person's conduct has violated the following standards set forth in the Act: . . . .
>
> . . . .
>
> Another reason for providing for this full party status is to keep pressure on the Government to pursue the case in a diligent fashion. . . .

132 Cong. Rec. H 9382 (October 7, 1986).

Sequoia points to other statements by members of Congress that the purpose of increasing the role and status of the qui tam plaintiff was to ensure that false claims were adequately prosecuted. During debate on the original House Bill Congressman Berman said the Bill," allows the qui tam suit to maintain his or her involvement in the suit even if the United States enters the case, to ensure that the case is effectively prosecuted on its merits." 132 Cong. Rec. H 6482 (September 9, 1986).

Congressman Bedell indicated in his remarks that *qui tam* suits are necessary to ensure that political pressure on the Executive Branch did not stop prosecution of FCA suits:[5]

> What is wrong with current law as enacted in 1943? First, when a citizen files a suit alleging fraud, the

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5. Since the enactment of the 1986 FCA amendments, some members of Congress have continued to voice concern over the lack of enforcement. "There is a problem out there, and that is that defense contractors are vigilant and aggressive in their efforts to escape liability for ripping off the taxpayers. They lobby very heavily both in the administrative branch and in Congress to make changes or not to have it fully enforced." 139 Cong. Rec. S 875.

> Government can decide to take over the case and then sit on it or seek to have it dismissed. . . . H.R. 4827 prevents this by establishing that the citizen who originally brought the suit may intervene to ensure diligent prosecution even after the Government has taken over the case. . . .
>
> . . . .
>
> . . . . in many cases, the authorities will not prosecute for political reasons.
>
> . . . My experience tells me that we cannot legislate common sense or integrity, and that as in Abe Lincoln's time, the Justice Department has neither the political will nor the resources to always enforce the [sic] all of the laws. We need some mechanism that uses informer suits.

132 Cong. Rec. H 6483 (Sept. 9., 1986). The statutory history of the 1986 amendments does not support the government's position that its power of dismissal is absolute in light of Congressional concern about the Government's diligent prosecution of FCA suits.

The Government also asserts that the FCA would be unconstitutional if § 3730(c)(2)(A) were interpreted to impose any restrictions on its power of dismissal. The Ninth Circuit considered the constitutionality of the FCA in *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1125 (1994). A primary issue in *Kelly* was whether the qui tam provisions upset the separation of powers by permitting private individuals and the Judicial Branch to encroach on Executive Branch authority. *Id.* at 755-56. After considering various provisions of the FCA, including the

dismissal and settlement provisions, the Court concluded that the FCA was constitutional because the Executive Branch retained sufficient control over FCA cases. *Id.* at 757.

The Government argues, based upon *Kelly*, that any limitation on its right to dismiss would render the FCA unconstitutional on separation of powers grounds. It focuses on the statements in *Kelly* which emphasize the extent of Government control over litigation and minimize the right of private parties or the judiciary to interfere with that control. In particular, the Government argues that the *Kelly* Court "went so far as to doubt that the 'notice and hearing requirement has amounted to much of a hurdle for the government.' " (Govt's Brief at 9, quoting *Kelly*.)

The Government quotes *Kelly* out of context. The full sentence reads, "It is not clear whether in practice this notice and hearing requirement has amounted to much of a hurdle for the government." *Id.* at 753 n.11. This statement is not an authoritative interpretation or construction of the hearing requirement for dismissal. The *Kelly* court did not hold that the FCA is constitutional, because as a matter of law, the hearing requirement was "not much of a hurdle for the government." *Kelly* only observed that it is "unclear" whether "in practice" the hearing requirement is much of a hurdle.

There are numerous statements in *Kelly* which directly contradict the Government's assertion that unfettered discretion to dismiss *qui tam* cases is necessary to preserve the FCA's constitutionality. *Kelly* upheld the FCA in spite of the limitations on the Government's ability to dismiss an FCA claim. For example, the Court stated that "ample precedent exists for judicial oversight of the government's decision to

dismiss a qui tam action." *Id.* at 756. Later the Court stated "judicial oversight of the government's dismissal power is unremarkable." *Id.* at 757.

While *Kelly* does not define the scope of judicial oversight of Government dismissal of *qui tam* actions, it expressly acknowledges that such oversight exists. If dismissal is subject to judicial oversight then the Government's right to dismiss is not "unconditional." The Government's reliance on *Kelly* is misplaced.

Likewise, the Government's reliance on *Juliano v. Federal Asset Disposition Assoc.*, 736 F.Supp. 348, 351 (D.D.C. 1990) is unpersuasive. In *Juliano* the *qui tam* plaintiff sued a federal agency, as well as private individuals, under the FCA. The Government moved to dismiss the federal agency, on the ground that any recovery against it would be paid out of funds given to the agency by the federal treasury. In essence, the Government was suing itself. The Court dismissed the agency, holding that there was no justiciable case or controversy. *Id.* at 352-53. *Juliano* did not address the standards for dismissal under § 3730(c)(2)(A) because the Government did not rely an this section in seeking dismissal.

The Government's right 'to dismiss Sequoia's claims under § 3730(c)(2)(A) is not judicially unreviewable.

7. *The Standard for Abuse of Prosecutorial Discretion in Criminal Cases Does Not Apply.*

The Government contends that Sequoia must show that the Department of Justice abused its prosecutorial discretion in moving to dismiss these cases. According to the Government,

it is an abuse of prosecutorial discretion to make decisions on the basis of suspect classifications or the exercise of constitutionally protected rights. Since Sequoia has not alleged that the decision to dismiss its claims was the product of race, gender, or other invidious discrimination, the Government argues that the Court must defer to the Government's exercise of prosecutorial discretion.

The Government possesses considerable discretion when deciding whom to criminally prosecute. *Wayte v. United States*, 470 U.S. 598, 706 (1985); *cf. FTC v. Universal-Rundle* Corp., 387 U.S. 244 (1967) (FTC can constitutionally enforce civil laws against some offenders, but not others). Nevertheless, it is unconstitutional for the Government to make prosecutorial decisions arbitrarily or on the basis of suspect classifications. *United States v. Redondo-Lemos*, 955 F.2d 1296, 1299-1300 10th Cir. 1992). Although arbitrary prosecutorial decisions in criminal cases are unconstitutional, there is no judicial remedy for them. *Id.* Only discriminatory charging decisions are subject to judicial scrutiny. "[A] prosecutor's charging decision cannot be judicially reviewed absent a prima facie showing that it rested on an impermissible basis, such as gender, race, or denial of a constitutional right." *United States v. Davis*, 36 F.3d 1424, 1432 (9th Cir. 1994), *cert. denied*, 63 U.S.L.W. 3627 (1995); *Redondo-Lemos*, 955 F.2d at 1302. To prevail on a claim of prosecutorial discrimination, the defendant must show discriminatory intent as well as discriminatory impact. *Redondo-Lemos*, 955 F.2d at 1301.

The rule prohibiting judicial examination of allegedly arbitrary decisions in criminal cases is based upon practical considerations. The Ninth Circuit has stated that prosecutorial charging and plea bargaining decisions "are particularly ill-

suited for broad judicial oversight." *Redondo-Lemos*, 955 F.2d at 1299. Criminal prosecutorial decisions "involve exercises of judgment and discretion that are often difficult to articulate in a manner suitable for judicial evaluation." *Id.* The factors that go into such decisions include: (1) the strength of the case; (2) the availability of resources; (3) the Government's enforcement priorities; and (4) the likely deterrent effect of the prosecution. *Id.; United States v. Carrasco*, 786 F.2d 1452, 1455 (9th Cir. 1986) ; *see also Moog Industries v. Federal Trade Commission*, 355 U.S. 411, 413 (1958) (similar factors involved in FTC' s decision to postpone operation of cease and desist order). Courts have little expertise in weighing these factors and it would be difficult, if not impossible, to create concrete rules to guide prosecutorial conduct. To determine whether a charging decision in a particular case was arbitrary, the court would have to inquire into "minute details about the process by which scores, perhaps hundreds, of charging decisions are made." *Redondo-Lemos*, 955 F.2d at 1299-1300.

The practical problems attendant to judicial entanglement in prosecutorial decisions and the concern for separation of powers outweigh the benefits of judicial intervention in cases where it is alleged that prosecutors have acted arbitrarily. *See id.* However, courts must address claims prosecutors have discriminated on the basis of a suspect classification. "The use of governmental authority to divide the population along suspect lines is a much more serious matter than capricious exercise of power standing alone." *Id.* at 1300-01. Furthermore, courts can more easily determine whether prosecutors have acted discriminatorily, by examining statistical evidence, than whether they have acted arbitrarily. *Id.* Unlike claims of arbitrary prosecutorial conduct, the importance of remedying discrimination claims outweighs the practical problems presented by judicial oversight.

Appendix C

The Government argues that the judicial deference given to prosecutorial decisions in criminal cases applies in this case. It maintains that the decision to dismiss an FCA claim is analogous to the decision to charge a criminal defendant and should not be reviewed absent claims of invidious discrimination. However, there are significant differences between criminal prosecutions and these FCA cases, which make appropriate review of Sequoia's claim that the Government acted arbitrarily.

The practical problems associated with review of prosecutorial decisions are not present in this case. The factors normally considered in charging decisions — availability of resources, merit, enforcement priorities, and deterrence — are not relevant here. Unlike criminal cases, FCA cases may be prosecuted by the relator. The Government cannot claim that it lacks resources to pursue a case initiated by a relator; if the relator prosecutes the case, the Government would only have to review a proposed settlement to ensure the Government's interests are adequately protected. This is a minimal burden because the Government does not need to intervene in the case to oppose a settlement. *See United States ex rel. Killingsworth v. Worthrolp Corp.*, 25 F.3d 715, 724 (9th Cir. 1994). The Government concedes, for the purposes of this motion, that Sequoia's claims against the Defendants have merit. The other factors, the Government's enforcement priorities and the likely deterrent effect of prosecution, have little bearing on the decision whether to prosecute given industry conditions, under which the marketing orders and the disputed regulations promulgated thereunder have been abandoned.

Although the balancing of factors that control exercise of the prosecutor's discretion is generally beyond the province of

the judiciary, the decision to dismiss this case is not based upon such factors, and the *Redondo-Lemos* concerns have less force here. The Government does not rely upon any of these factors in seeking to dismiss Sequoia's FCA claims. This case is also distinguished from the exercise of prosecutorial discretion in criminal cases because the court need not examine the "minute details" of many other cases to determine whether the government has acted arbitrarily. Dismissal under § 3730(c)(2)(A) is a rare occurrence — this is the first time the government has used this provision since it was enacted in 1986 — judicial review for arbitrariness will be infrequent and will impose little burden upon the Government.

Sequoia contends judicial review is important in this case because dismissal will foreclose recovery of public money lost due to fraud on the government.[6] In enacting the *qui tam* provisions of the FCA in 1986, Congress declared its desire to increase the prosecution of FCA claims and to ensure the recovery of public money lost to fraud. Unlike *Redondo-Lemos,* in which the harm from discriminatory conduct was greater than the harm from arbitrary conduct, here, the loss to the U.S. Treasury from the failure to prosecute legitimate FCA claims is the same irrespective of whether the decision was arbitrary or discriminatory.

Redondo-Lemos also recognized that concern for separation of powers weighed against judicial review of arbitrary charging decisions in criminal cases. However, in FCA cases, Congress specifically provided for judicial review of the Government's power to dismiss. *United States ex rel. Kelly v. Boeing Co.,*

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6. Although the Government contends that there has been no loss to the U.S. Treasury and that no FCA claim is stated, it has assumed the FCA claims are valid for the purpose of this motion.

9 F.3d 743, 756-57 (9th Cir. 1993). The Ninth Circuit held that judicial review of the Government's decision to dismiss an FCA case does not violate separation of powers, *id.*, noting implicitly that it would extend to allegations that " 'the Government's decision was based on arbitrary or improper considerations.' " *Id.* at n.11 (quoting Senate Judiciary Committee, False Claims Amendments Act of 1986, S.Rep. No. 345, 99th Cong., 2d. Sess. 26 (1986)).

Judicial review of claims that the Government has arbitrarily made prosecutorial decisions does not restrict the Government's prosecutorial discretion. Arbitrary enforcement of law is unconstitutional whether or not a judicial remedy exists. *Redondo-Lemos*, 955 F.2d at 1300; *FTC v. Universal-Rundle Corp.*, 387 U.S. 244 (1967) ("[T]he Federal Trade Commission does not have unbridled power to institute proceedings which will arbitrarily destroy one of many law violators in an industry."); *see also Bateson v. Geisse*, 857 F.2d 1300, 1303 (9th Cir. 1988) (arbitrary enforcement of local regulations may constitute a substantive due process violation). In this case, judicial review of allegedly arbitrary dismissal of FCA claims does not invade prosecutorial discretion.

8. *The Standard of Review*

The only clue to considerations deemed important to review of a government motion to dismiss FCA cases is found in legislative history to the FCA. Resort to statutory history is appropriate when the statute itself is ambiguous. *Barnhill v. Johnson*, 112 S. Ct. 1386, 1391 (1992); *see also Funbus Systems, Inc. v. California Pub. Utils. Comm'n*, 801 F.2d 1120, 1125-26 (9th Cir. 1986) ("In construing a statute in a case of first impression, we look to the traditional signposts of statutory

construction: first, the language of the statute itself; second, its legislative history. . . .") . Here, section § 3730(c)(2)(A) is ambiguous because it provides no explicit standard of review for dismissal motions.

The Senate Judiciary Committee Report on an early version of the bill amending the FCA, stated:

> [T]he person who brought the action may formally object to any *motions to dismiss* or proposed settlements between the Government and the defendant.
>
> Any objections filed by the *qui tam* plaintiff may be accompanied by a petition for an evidentiary hearing on those objections. . . . [E]videntiary hearings should be granted when the *qui tam* relator shows a *"substantial and particularized need"* for a hearing. Such a showing could be made if the relator presents a colorable claim that the settlement or dismissal is *unreasonable in light of existing evidence,* that the *Government has not fully investigated the allegations,* or that *the Government's decision was based on arbitrary and improper considerations.* (emphasis added) .

Senate Judiciary Committee, False Claims Amendments Act of 1986, S.Rep. No. 345, 99th Cong., 2d Sess. 26 (1986), *reprinted in,* 1986 U.S.C.C.A.N. 5266, 5291. The Committee stated its intent to provide *qui tam* plaintiffs "with a more direct role not only in keeping abreast of the Government's efforts and protecting his financial stake, but also in acting as a check that the Government does not neglect evidence, cause unduly

delay, *or drop the false claims case without legitimate reason*." *Id.* at 25-26. This report recognizes that in evaluating a dismissal motion, an evidentiary hearing may be justified upon a showing of substantial and particularized need. The standard can be defined from these legislative concerns: the dismissal of a meritorious case is arbitrary and improper if it is not rationally related to a legitimate governmental interest or will perpetrate fraud or illegality. Additional grounds for an evidentiary hearing can arise upon a showing that the dismissal is unreasonable in light of existing evidence or that the Government has not fully investigated the allegations. Both of these grounds concern whether the dismissal is rationally related to a legitimate governmental interest.

The settlement and dismissal provisions of the final bill were adopted after the drafting of this Committee Report. Nevertheless, two Ninth Circuit opinions have referred to this portion of the legislative record in interpreting the settlement and dismissal provisions. *Killingsworth,* 25 F.3d 715, 723 n.7; *Kelly,* 9 F.3d 743, 754 n.11. It seems implausible that Congress amended § 3730 (c) (2) (A) after the Senate Committee Report was written to authorize the Department of Justice to arbitrarily dismiss meritorious *qui tam* actions. The Senate Committee Report is probative of Congressional intent regarding judicial review of dismissal motions. *See United States v. Van Den Berg* , 5 F.3d 439, 443 (9th Cir. 1993) ("Where other statutory tools are not determinative, legislative statements, particularly committee reports, can be helpful in determining statutory meaning and, therefore, Congressional intent.)

The purpose of the FCA is to combat fraud against the Government. Congress enacted the *qui tam provisions* to ensure that fraud would be prosecuted even if the Department of Justice

was unable or unwilling to pursue the case. The 1986 Amendments to the FCA, and the *qui tam* provisions generally, support the prosecution of meritorious cases. *United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493, 1497 (11th Cir. 1991); *United State ex rel. La Valley v. First Nat'l* Bank, 707 F. Supp. 1351, 1355 (D. Mass 1988). Congress, wary of erosion of the Department of Justice's political will to prosecute certain cases, sought to prevent the arbitrary dismissal of meritorious cases.

The separation of powers is preserved by a standard of review which is deferential and prevents any relator from usurping the prosecutorial power of the Executive Branch to identify, balance, and choose among competing legitimate governmental interests. The Executive retains the ultimate authority to decide whether a particular government concern outweighs the interests advanced by prosecution of a FCA claim. The Government can decide to prosecute or dismiss a meritorious *qui tam* action "notwithstanding the objections" of the relator, as long as it does so arbitrarily.

Nor does such a standard of review vest too much authority in the judiciary. As the Ninth Circuit noted in *Kelly*, "significant precedent exists for the requirement that a court approve the government's decision to terminate a case brought on behalf of the United States." *Kelly*, 9 F.3d at 754 n.12; *United States, ex rel. Stillwell v. Hughes Helicopters, Inc.*, 714 F. Supp. 1084, 1093 (C.D. Cal. 1989). Both *Kelly* and *Stillwell* point out that leave of court is required to dismiss a criminal indictment and that the court can accept or reject a plea bargain. *See* Fed. R. Crim. P.. Rule 4 8 (a) ; Rule 11(e). Such authority does not substitute judicial discretion for executive; it retains in the judiciary the power to reject executive action that is unlawful.

The standard applied does not involve the court in "exercises of judgment and discretion that are often difficult to articulate in a manner suitable for judicial evaluation." *Redondo-Lemos,* 955 F.2d 1296, 1299. Courts regularly examine legislative and executive actions to determine whether they are rationally related to a legitimate governmental purpose.

This standard of review for dismissal is less burdensome than the standard of review for settlements. Under the settlement standards, the Court must inquire into the fairness, reasonableness, and adequacy of the agreement, in view of all the circumstances, which may entail detailed analysis of the merits and the value of claims to be compromised as well as a weighing and balancing of competing interests. The Court may reject a settlement if it believes the evidence in the case warrants a greater recovery. *Gravitt v. General Electric* Co., 680 F. Supp 1162 (S.D.Ohio), *appeal dismissed without op.,* 848 F.2d 190 (6th Cir.), *cert. denied,* 488 U.S. 901 (1988). Here, the court will not weigh the evidence to determine whether the value of the potential recovery outweighs the asserted governmental interest. If the finding can be made that the Government's decision to dismiss is rationally related to a legitimate governmental purpose and that dismissal is not arbitrary, fraudulent, or illegal, the inquiry is at an end. Accordingly, unwarranted judicial interference with the independence of the executive branch is not threatened. *Redondo,* 955 F.2d at 1303; *United States v. Miller,* 722 F.2d 562, 565 (9th Cir. 1983).

B. *The Dismissal Standard Applied*

Since the Government's right to dismiss under § 3720(c)(2)(A) is not unreviewable, it must be determined whether the Government has articulated a facially satisfactory

basis for dismissal which obviates the need for further review, or whether Sequoia is entitled to an evidentiary hearing. The Ninth Circuit requires an evidentiary hearing on a proposed FCA settlement upon a showing of a "substantial and particularized need" by the relator. *Killingsworth,* 25 F.3d at 723-24 n.7; *Kelly*, 9 F.3d at n.11. This same standard should apply to motions to dismiss. As *Kelly* noted, this standard limits the burden imposed on the Government and courts when the relator opposes a settlement or dismissal. The relator must make this showing at the initial hearing on the motion to dismiss, which is required by § 3730(c)(2)(A). Substantial and particularized need can be established by: challenging the legitimacy of the asserted governmental interest, or by pointing to facts indicating that the claimed interest is pretextual, or that dismissal is fraudulent or sought for an unlawful purpose, or if it appears that dismissal does not rationally advance the asserted interest.

Here, the Government contends these cases should be dismissed to serve the purposes of the AMAA, which "was passed in response to unstable marketing conditions during the Depression, with an objective of helping farmers obtain a fair value for their agricultural products." *Pescosolido v. Black,* 765 F.2d 827, 828 (9th Cir. 1985). "The Act contemplates a cooperative venture among the Secretary, handlers, and producers the principal purposes of which are to raise the price of agricultural products and to establish an orderly system for marketing them." *Block v. Community Nutrition Institute,* 467 340, 346 (1984). "One of the primary objectives of the AMAA is to establish and maintain parity prices for farmers." *United States v. Sunny Cove Citrus* Ass'n, 854 F. Supp. 669, 674 (E.D.Cal. 1994). Through the AMAA Congress sought to maintain an orderly flow of commodities to market throughout

the normal marketing season and to avoid unreasonable fluctuations in supplies and prices. 7 U.S.C. § 602(4).

The AMAA authorizes the Secretary of Agriculture to issue marketing orders limiting the quantity of commodities shipped into markets identified by the Secretary, thus protecting prices for producers and maintaining orderly marketing conditions. *Cecelia Packing Co. v. United States Dep't of Agric.*, 10 F.3d 616, 618 (9th Cir. 1993) *(citing Riverbend Farms v. Magidan,* 958 F.2d 1479, 1483 (9th Cir.) *cert. denied,* 113 S. Ct. 598 (1992)).

According to the Government, the success of the AMAA depends upon "good will and cooperation" among the members of California-Arizona citrus industry. "Marketing orders depend upon a broad consensus in the community that the program benefits." (Rominger dec. ¶ 3) . The USDA believes "the [citrus] industry has lost faith in the effectiveness of [marketing] orders and their ability to achieve the statutory objectives" of the AMAA. *(Id.)* It points to the widespread underreporting (cheating) by handlers seeking to avoid prorate marketing orders and the extensive litigation challenging the marketing orders, that has been pending almost ten years, as evidence to support this conclusion.

The Government asserts that it has a legitimate interest in restoring "peace" to the citrus industry in California and Arizona. To this end, it has terminated the marketing orders, which have been the source of the divisiveness and protracted litigation. It has also dismissed all of the cases in which it was seeking to enforce AMAA penalties against handlers who overshipped oranges in violation of the prorate, in part because it believed the marketing order regulations were no longer

enforceable. *See United States v. Sunny Cove Citrus Ass'n,* 854 F. Supp. 669 (E.D.Cal. 1994). It contends that dismissal of these FCA cases is necessary to bring peace and to restore cooperation throughout the citrus industry.

The Government maintains that dismissal of the FCA cases, which are premised on the underreporting of weekly shipments in violation of the regulations promulgated under the AMAA, which causes the Government to lose assessments, is a necessary part of its amnesty policy. It argues that if these cases are not dismissed then its policy of general amnesty will be thwarted; the defendants in these cases will be unfairly punished for their violations, while other cheaters will go unpunished, and the potential economic effect of any recovery will destroy members of the industry. The Government continues to claim that Sequoia is the biggest cheater and greatest beneficiary of the amnesty policy, although it dismissed its AMAA action against Sequoia in August of 1994. Sequoia notes that certain of the AMAA claims alleged against it arose during times (pre-1985) when no dispute exists as to the validity of marketing order regulations. This position is said to be inconsistent with the Government's view that invalidity of marketing orders undermines enforceability of prorate and related rules.

The Government suggests these FCA cases have the economic potential to destroy a significant number of citrus industry members, which will subvert the AMAA's primary goal to enhance the profitability of industry members. It states the cost of defending these suits and the potential damage awards will bankrupt some industry participants. As to this claim, only the legal conclusion is offered, without evidentiary support.

Sequoia contends dismissal of these FCA cases is not rationally related to the goal of industry peace. It argues that the industry did not want past marketing orders and cannot agree on new marketing orders because too many handlers believe AMAA regulation is not in their best interest. Dismissal of these cases will not change the views of those who believe prorate marketing orders are ineffective and therefore will not improve cooperation within the industry. According to Sequoia, dismissal will increase rather than decrease the bitterness between those in the industry who cheated and those who did not, (Roth dec. § 8), resulting in divisiveness that will thwart any cooperation among the Secretary, handlers, and producers. The Government and defendants counter that Sequoia is a major citrus industry competitor and its maintenance of these cases is the most divisive force in the industry.

Sequoia argues the Government's asserted interest in industry peace is pretextual and that the USDA actually recommended dismissal as a political favor to support the Government's claim that dismissal of these cases is part of a general amnesty program because the Government did not move to dismiss these cases at the same time that it dismissed all of the AMAA enforcement actions. It also argues that it did not benefit from the Government's asserted amnesty policy because it was not guilty of prorate violations, but even if it was, it should be permitted to prove allegedly valid claims against wrongdoers.

To show a substantial and particularized need for an evidentiary hearing, the relator must present, "*a colorable claim* that the settlement or dismissal is unreasonable in light of existing evidence, that the Government has not fully investigated the allegations, or that the Government's decision

was based on arbitrary and improper considerations." *Kelly*, 9 F.3d at 753-54 n.11 (quoting Senate Judiciary Committee, False Claims Amendments Act of 1986, S.Rep. No. 345., 99th Cong., 2d Sess. 26 (1986), *reprinted in*, 1986 U.S.C.C.A.N. 5266, 5291). Here, Sequoia has presented sufficient evidence to raise three "colorable claims" that dismissal is "arbitrary" or "based upon improper considerations." First, Sequoia has questioned the legitimacy of the governmental objectives. Second, it has challenged the efficacy of dismissal to achieve these objectives. Third, it has raised a claim that the Government's reasons for dismissal are pretextual and the result of improper influence. Sequoia has shown a substantial and particularized need for an evidentiary hearing.

This is not to suggest that an evidentiary hearing is required in every FCA case in which the relator opposes dismissal. However, here it is alleged in good faith that the conflict that currently exists in the California-Arizona citrus industry will not be reduced by dismissal. A segment of the citrus industry believes dismissal would have the contrary effect. Moreover, no evidence of the destructive effect of prosecution to conclusion of these cases has been proffered. In this instance, a full and public evidentiary scrutiny of the respective positions of the Government, defendants, and Sequoia is necessary to assure that dismissal comports with the objectives of the FCA and the governmental interests identified.

III. CONCLUSION.

For the foregoing reasons, an evidentiary hearing will be scheduled, at which the parties may address the justification(s) for dismissal of the FCA cases. The burden of going forward with the evidence of a valid governmental interest and how it

is served by dismissal is on the Government. Once such evidence is presented, the burden shifts to the relator to present evidence that dismissal is arbitrary, fraudulent, or illegal. Ruling on motions to dismiss these cases is deferred to conclusion of the evidentiary hearing. The parties shall schedule a conference with the court to set a date for the evidentiary hearing. SO ORDERED.

DATED: March 3, 1995.

s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE

APPENDIX D — AMENDED JUDGMENT AND DISMISSAL WITH PREJUDICE OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA DATED NOVEMBER 9, 1995 IN *UNITED STATES, ex rel. LISLE BABCOCK v. DOLE CITRUS and/or CENTRAL VALLEY CITRUS*

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UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

CV-F-93-5016 OWW

UNITED STATES, Ex Rel. LISLE BABCOCK,

Plaintiffs,

v.

DOLE CITRUS, a California corporation, formerly known as BLUE GOOSE GROWERS, INC., and doing business as DOLE CITRUS and/or CENTRAL VALLEY CITRUS,

Defendants.

Appendix D

AMENDED JUDGMENT AND DISMISSAL WITH PREJUDICE

It is ORDERED, ADJUDGED AND DECREED that for the reasons set forth in this Court's "Memorandum Opinion and Order Re: United States' Motion to Dismiss" filed on September 27, 1995, this action is hereby dismissed with prejudice. Each party shall bear its own costs and attorney fees.

Dated: November 9, 1995

s/ Oliver W. Wanger
HONORABLE OLIVER W. WANGER
U.S. District Court Judge

APPENDIX E — JUDGMENT AND DISMISSAL WITH PREJUDICE OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA FILED OCTOBER 27, 1995 IN *UNITED STATES, ex rel. SEQUOIA ORANGE CO. v. STRATHMORE PACKINGHOUSE CO.*

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UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

CV-F-94-5287 OWW

UNITED STATES, Ex Rel. SEQUOIA ORANGE CO.,

Plaintiff,

v.

STRATHMORE PACKINGHOUSE CO.,

Defendant.

Appendix E

JUDGMENT AND DISMISSAL WITH PREJUDICE

It is ORDERED, ADJUDGED AND DECREED that for the reasons set forth in this Court's "Memorandum Opinion and Order Re: United States' Motion to Dismiss" filed on September 27, 1995, this action is hereby dismissed with prejudice. Each party shall bear its own costs and attorney fees.

Dated: October 26, 1995

s/ Oliver W. Wanger
HONORABLE OLIVER W. WANGER
U.S. District Court Judge

APPENDIX F — JUDGMENT AND DISMISSAL WITH PREJUDICE OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA FILED OCTOBER 27, 1995 IN *UNITED STATES, ex rel. SEQUOIA ORANGE CO. v. MILLWOOD PACKING, INC., SUNKIST GROWERS, INC.*

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UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

CV-F-94-5288 OWW

UNITED STATES, Ex Rel. SEQUOIA ORANGE CO.,

Plaintiff,

v.

MILLWOOD PACKING, INC., SUNKIST GROWERS, INC.,

Defendant.

Appendix F

JUDGMENT AND DISMISSAL WITH PREJUDICE

It is ORDERED, ADJUDGED AND DECREED that for the reasons set forth in this Court's "Memorandum Opinion and Order Re: United States' Motion to Dismiss" filed on September 27, 1995, this action is hereby dismissed with prejudice. Each party shall bear its own costs and attorney fees.

Dated: October 26, 1995

s/ Oliver W. Wanger
HONORABLE OLIVER W. WANGER
U.S. District Court Judge

APPENDIX G — JUDGMENT AND DISMISSAL WITH PREJUDICE OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA FILED OCTOBER 27, 1995 IN *UNITED STATES, ex rel. SEQUOIA ORANGE CO. v. BLUE BANNER COMPANY, INC., SUNKIST GROWERS, INC.*

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UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

CV-F-94-5289 OWW

UNITED STATES, Ex Rel. SEQUOIA ORANGE CO.,

Plaintiff,

v.

BLUE BANNER COMPANY, INC., SUNKIST GROWERS, INC.,

Defendant.

Appendix G

JUDGMENT AND DISMISSAL WITH PREJUDICE

It is ORDERED, ADJUDGED AND DECREED that for the reasons set forth in this Court's "Memorandum Opinion and Order Re: United States' Motion to Dismiss" filed on September 27, 1995, this action is hereby dismissed with prejudice. Each party shall bear its own costs and attorney fees.

Dated: October 26, 1995

s/ Oliver W. Wanger
HONORABLE OLIVER W. WANGER
U.S. District Court Judge

APPENDIX H — JUDGMENT AND DISMISSAL WITH PREJUDICE OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA FILED OCTOBER 27, 1995 IN *UNITED STATES, ex rel. SEQUOIA ORANGE CO. v. VENTURA COUNTY FRUIT GROWERS, INC.*

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UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

CV-F-94-5290 OWW

UNITED STATES, Ex Rel. SEQUOIA ORANGE CO.,

Plaintiff,

v.

VENTURA COUNTY FRUIT GROWERS, INC.,

Defendant.

Appendix H

JUDGMENT AND DISMISSAL WITH PREJUDICE

It is ORDERED, ADJUDGED AND DECREED that for the reasons set forth in this Court's "Memorandum Opinion and Order Re: United States' Motion to Dismiss" filed on September 27, 1995, this action is hereby dismissed with prejudice. Each party shall bear its own costs and attorney fees.

Dated: October 26, 1995

s/ Oliver W. Wanger
HONORABLE OLIVER W. WANGER
U.S. District Court Judge

APPENDIX I — JUDGMENT AND DISMISSAL WITH PREJUDICE OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA FILED OCTOBER 27, 1995 IN *UNITED STATES, ex rel. SEQUOIA ORANGE CO. v. LIMONERA COMPANY, SUNKIST GROWERS, INC.*

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UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

CV-F-94-5291 OWW

UNITED STATES, Ex Rel. SEQUOIA ORANGE CO.,

Plaintiff,

v.

LIMONERA COMPANY, SUNKIST GROWERS, INC.,

Defendant.

Appendix I

JUDGMENT AND DISMISSAL WITH PREJUDICE

It is ORDERED, ADJUDGED AND DECREED that for the reasons set forth in this Court's "Memorandum Opinion and Order Re: United States' Motion to Dismiss" filed on September 27, 1995, this action is hereby dismissed with prejudice. Each party shall bear its own costs and attorney fees.

Dated: October 26, 1995

s/ Oliver W. Wanger
HONORABLE OLIVER W. WANGER
U.S. District Court Judge

APPENDIX J — JUDGMENT AND DISMISSAL WITH PREJUDICE OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA FILED OCTOBER 27, 1995 IN *UNITED STATES, ex rel. SEQUOIA ORANGE CO. v. GOLDEN VALLEY CITRUS, INC., SUNKIST GROWERS, INC.*

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UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

CV-F-94-5292 OWW

UNITED STATES, Ex Rel. SEQUOIA ORANGE CO.,

Plaintiff,

v.

GOLDEN VALLEY CITRUS, INC., SUNKIST GROWERS, INC.,

Defendant.

Appendix J

JUDGMENT AND DISMISSAL WITH PREJUDICE

It is ORDERED, ADJUDGED AND DECREED that for the reasons set forth in this Court's "Memorandum Opinion and Order Re: United States' Motion to Dismiss" filed on September 27, 1995, this action is hereby dismissed with prejudice. Each party shall bear its own costs and attorney fees.

Dated: October 26, 1995

s/ Oliver W. Wanger
HONORABLE OLIVER W. WANGER
U.S. District Court Judge

APPENDIX K — JUDGMENT AND DISMISSAL WITH PREJUDICE OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA FILED OCTOBER 27, 1995 IN *UNITED STATES, ex rel. SEQUOIA ORANGE CO. v. SUNLAND PACKING HOUSE CO.*

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UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

CV-F-88-566 OWW

UNITED STATES, Ex Rel. SEQUOIA ORANGE CO.,

Plaintiff,

v.

SUNLAND PACKING HOUSE CO.,

Defendant.

Appendix K

JUDGMENT AND DISMISSAL WITH PREJUDICE

It is ORDERED, ADJUDGED AND DECREED that for the reasons set forth in this Court's "Memorandum Opinion and Order Re: United States' Motion to Dismiss" filed on September 27, 1995, this action is hereby dismissed with prejudice. Each party shall bear its own costs and attorney fees.

Dated: October 26, 1995

s/ Oliver W. Wanger
HONORABLE OLIVER W. WANGER
U.S. District Court Judge

APPENDIX L — JUDGMENT AND DISMISSAL WITH PREJUDICE OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA FILED OCTOBER 27, 1995 IN *UNITED STATES, ex rel. SEQUOIA ORANGE CO. v. SAN JOAQUIN CITRUS,* and *SUNKIST GROWERS, INC.*

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UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

CV-F-89-002 OWW
Consolidated with
CV-F-89-004
CV-F-89-005
CV-F-89-006
CV-F-89-007
CV-F-89-008
CV-F-89-012
CV-F-89-013
CV-F-89-014

Appendix L

UNITED STATES, Ex Rel. SEQUOIA ORANGE CO.,

Plaintiff,

v.

SAN JOAQUIN CITRUS, and, SUNKIST GROWERS, INC.,

Defendant.

JUDGMENT AND DISMISSAL WITH PREJUDICE

It is ORDERED, ADJUDGED AND DECREED that for the reasons set forth in this Court's "Memorandum Opinion and Order Re: United States' Motion to Dismiss" filed on September 27, 1995, this action is hereby dismissed with prejudice. Each party shall bear its own costs and attorney fees.

Dated: October 26, 1995

s/ Oliver W. Wanger
HONORABLE OLIVER W. WANGER
U.S. District Court Judge

APPENDIX M — JUDGMENT AND DISMISSAL WITH PREJUDICE OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA FILED OCTOBER 27, 1995 IN *UNITED STATES, ex rel. SEQUOIA ORANGE CO. v. BAIRD-NEECE PACKING CORP.*, and *SUNKIST GROWERS, INC.*

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EASTERN DISTRICT OF CALIFORNIA

CV-F-89-050 OWW
Consolidated with
CV-F-89-051
CV-F-89-052
CV-F-89-053
CV-F-89-054
CV-F-89-055
CV-F-89-056
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CV-F-89-060
CV-F-89-061
CV-F-89-062

Appendix M

UNITED STATES, Ex Rel. SEQUOIA ORANGE CO.,

Plaintiff,

v.

BAIRD-NEECE PACKING CORP., and SUNKIST GROWERS, INC.,

Defendant.

JUDGMENT AND DISMISSAL WITH PREJUDICE

It is ORDERED, ADJUDGED AND DECREED that for the reasons set forth in this Court's "Memorandum Opinion and Order Re: United States' Motion to Dismiss" filed on September 27, 1995, this action is hereby dismissed with prejudice. Each party shall bear its own costs and attorney fees.

Dated: October 26, 1995

s/ Oliver W. Wanger
HONORABLE OLIVER W. WANGER
U.S. District Court Judge

APPENDIX N — JUDGMENT AND DISMISSAL WITH PREJUDICE OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA FILED OCTOBER 27, 1995 IN *UNITED STATES, ex rel. SEQUOIA ORANGE CO. v. OXNARD LEMON COMPANY, et al.*

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UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

CV-F-91-194 OWW

UNITED STATES, Ex Rel. SEQUOIA ORANGE CO.,

Plaintiff,

v.

OXNARD LEMON COMPANY, et al.,

Defendant.

Appendix N

JUDGMENT AND DISMISSAL WITH PREJUDICE

It is ORDERED, ADJUDGED AND DECREED that for the reasons set forth in this Court's "Memorandum Opinion and Order Re: United States' Motion to Dismiss" filed on September 27, 1995, this action is hereby dismissed with prejudice. Each party shall bear its own costs and attorney fees.

Dated: October 26, 1995

s/ Oliver W. Wanger
HONORABLE OLIVER W. WANGER
U.S. District Court Judge

APPENDIX O — JUDGMENT AND DISMISSAL WITH PREJUDICE OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA FILED OCTOBER 27, 1995 IN *UNITED STATES, ex rel. SEQUOIA ORANGE CO. v. MISSION CITRUS COMPANY, et al.*

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UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

CV-F-91-195 OWW

UNITED STATES, Ex Rel. SEQUOIA ORANGE CO.,

Plaintiff,

v.

MISSION CITRUS COMPANY, et al.,

Defendant.

Appendix O

JUDGMENT AND DISMISSAL WITH PREJUDICE

It is ORDERED, ADJUDGED AND DECREED that for the reasons set forth in this Court's "Memorandum Opinion and Order Re: United States' Motion to Dismiss" filed on September 27, 1995, this action is hereby dismissed with prejudice. Each party shall bear its own costs and attorney fees.

Dated: October 26, 1995

s/ Oliver W. Wanger
HONORABLE OLIVER W. WANGER
U.S. District Court Judge

APPENDIX P — JUDGMENT AND DISMISSAL WITH PREJUDICE OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA FILED OCTOBER 27, 1995 IN *UNITED STATES, ex rel. SEQUOIA ORANGE CO. v. VENTURA PACIFIC COMPANY, et al.*

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UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

CV-F-91-196 OWW

UNITED STATES, Ex Rel. SEQUOIA ORANGE CO.,

Plaintiff,

v.

VENTURA PACIFIC COMPANY, et al.,

Defendant.

Appendix P

JUDGMENT AND DISMISSAL WITH PREJUDICE

It is ORDERED, ADJUDGED AND DECREED that for the reasons set forth in this Court's "Memorandum Opinion and Order Re: United States' Motion to Dismiss" filed on September 27, 1995, this action is hereby dismissed with prejudice. Each party shall bear its own costs and attorney fees.

Dated: October 26, 1995

s/ Oliver W. Wanger
HONORABLE OLIVER W. WANGER
U.S. District Court Judge

APPENDIX Q — JUDGMENT AND DISMISSAL WITH PREJUDICE OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA FILED OCTOBER 27, 1995 IN *UNITED STATES, ex rel. SEQUOIA ORANGE CO. v. SATICOY LEMON ASSOCIATION, et al.*

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UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

CV-F-91-197 OWW

UNITED STATES, Ex Rel. SEQUOIA ORANGE CO.,

Plaintiff,

v.

SATICOY LEMON ASSOCIATION, et al.,

Defendant.

Appendix Q

JUDGMENT AND DISMISSAL WITH PREJUDICE

It is ORDERED, ADJUDGED AND DECREED that for the reasons set forth in this Court's "Memorandum Opinion and Order Re: United States' Motion to Dismiss" filed on September 27, 1995, this action is hereby dismissed with prejudice. Each party shall bear its own costs and attorney fees.

Dated: October 26, 1995

s/ Oliver W. Wanger
HONORABLE OLIVER W. WANGER
U.S. District Court Judge

APPENDIX R — ORDER DENYING REQUEST TO AMEND COMPLAINT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA FILED OCTOBER 26, 1995

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CV-F-89-566 OWW
CV-F-89-002 OWW
CV-F-89-004 OWW
THROUGH
CV-F-89-008 OWW
CV-F-89-012 OWW
THROUGH
CV-F-89-014 OWW
CV-F-89-050 OWW
THROUGH
CV-F-89-062 OWW
CV-F-89-194 OWW
THROUGH
CV-F-91-197 OWW
CV-F-93-5016 OWW
CV-F-94-5287 OWW
THROUGH
CV-F-94-5292 OWW

UNITED STATES ex rel. SEQUOIA ORANGE,

Plaintiff,

v.

BAIRD-NEECE PACKING CORP.,

Defendants.

AND CONSOLIDATED CASES.

Appendix R

ORDER DENYING REQUEST TO AMEND COMPLAINT

Relator, Sequoia Orange Company, Inc., by letter of October 4, 1995, requested leave to amend the complaints in these cases. Amendment of pleadings is governed by Federal Rule of Civil Procedure Rule 15 and related Local Rules of Court concerning the noticing of motions. The procedure followed by Sequoia's counsel fails to provide reasonable notice and opportunity for hearing of the request. By reason of such procedural infirmity, the informal request to amend the complaint is denied.

Alternatively, the request is substantively improper. Contrary to the assertion of Sequoia's counsel that leave to amend is routinely granted when motions to dismiss are granted, even in pleading motion cases, whether leave to amend is granted following a dismissal is dictated by the unique facts and circumstances of each case. Here, Sequoia has sued as a relator in bringing citrus industry False Claims Act cases. It has brought suit in no other capacity, nor has it asserted any other claims. Assumedly, it now wishes to maintain private actions in its individual corporate capacity, not as a relator under the False Claims Act. No legal authority exists for granting leave to amend to convert a *qui tam* case to a private action for different private claims, where the Court has determined under the provisions of §3730 (c) (2) (A) that all the False Claims Act cases should be dismissed with prejudice. The request is denied on substantive grounds.

Sequoia asserts a pending motion for sanctions brought by Sequoia against defendant Sunkist and consideration of a prior contempt order against Sequoia and its counsel for monetary and representation preclusion sanctions on remand from the

Ninth Circuit should first be decided. These matters are addressed by separate Memorandum Opinions and Orders.

IT IS ORDERED that for procedural and substantive infirmity, Sequoia Orange Company, Inc.'s requests of October 4, 1995, are DENIED in their entirety.

DATED: October 26, 1995.

s/ Oliver W. Wanger
Oliver W. Wanger
UNITED STATES DISTRICT JUDGE

APPENDIX S — ORDER RE: UNITED STATES' MOTION TO DISMISS OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA FILED SEPTEMBER 28, 1995

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CV F-94-5287 OWW

UNITED STATES, ex rel. SEQUOIA ORANGE COMPANY,

Plaintiff,

v.

STRATHMORE PACKINGHOUSE COMPANY,

Defendant.

CV-F-94-5288-OWW

UNITED STATES, ex rel. SEQUOIA ORANGE COMPANY,

Plaintiff,

v.

MILLWOOD PACKING, INC., SUNKIST GROWERS, INC.

Defendant.

Appendix S

CV-F-94-5289-OWW

UNITED STATES, ex rel. SEQUOIA ORANGE COMPANY,

Plaintiff,

v.

BLUE BANNER COMPANY, INC., SUNKIST GROWERS, INC.

Defendant.

CV-F-94-5290-OWW

UNITED STATES, ex rel. SEQUOIA ORANGE COMPANY,

Plaintiff,

v.

VENTURA COUNTY FRUIT GROWERS, INC.,

Defendant.

CV-F-94-5291-OWW

UNITED STATES, ex rel. SEQUOIA ORANGE COMPANY,

Plaintiff,

Appendix S

v.

LIMONERA COMPANY, SUNKIST GROWERS, INC.,

Defendant.

CV-F-94-5292-OWW

UNITED STATES, ex rel. SEQUOIA ORANGE COMPANY,

Plaintiff,

v.

GOLDEN VALLEY CITRUS, INC., SUNKIST GROWERS, INC.

Defendant.

ORDER RE: UNITED STATES' MOTION TO DISMISS

On September 26, 1995 the Court issued a Memorandum Opinion and Order Re: United States' Motion to Dismiss in case *CV-F-88-566-OWW UNITED STATES, ex rel., vs SUNLAND PACKING HOUSE COMPANY.* By reference, the Order of dismissal shall also apply to the above-entitled actions.

Counsel for the United States shall also submit proposed forms of Judgment in these matters.

Dated: September 28, 1995

s/ Oliver W. Wanger
OLIVER W. WANGER
United States District Judge

APPENDIX T — STATUTES AND RULES

FEDERAL RULES OF CIVIL PROCEDURE

Rule 1. Scope and Purpose of Rules

These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.

Rule 12. Defenses and Objections — When and How Presented — By Pleading or Motion — Motion for Judgment on Pleadings

* * *

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial

any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(c) Motion for Judgment on the Pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

* * *

Rule 41. Dismissal of Actions

(a) Voluntary Dismissal: Effect Thereof.

(1) *By Plaintiff; by Stipulation.* Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the

notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

(2) *By Order of Court.* Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

* * *

Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

* * *

Appendix T

(c) Motion and Proceedings Thereon. * * * The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

STATUTES

FALSE CLAIMS ACT, 31 U.S.C, § 3729, ET SEQ. [EXCERPTS]:

31 U.S.C. § 3730. Civil actions for false claims

(a) Responsibilities of the attorney general. — The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

(b) Actions by private persons. —

(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person

possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure.[1] The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall —

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

Appendix T

(c) Rights of the parties to Qui Tam actions. —

(1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2)(A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as —

(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses;

(iii) limiting the person's cross-examination of witnesses; or

(iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

(4) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil

investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(d) Award to Qui Tam plaintiff. —

(1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or

Government Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any

relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.

(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(e) Certain actions barred. —

(1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

(2) (A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in paragraphs (1) through (8) of section 101(f) of the Ethics in Government Act of 1978 (5 U.S.C.App.).

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4) (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

(f) Government not liable for certain expenses. — The Government is not liable for expenses which a person incurs in bringing an action under this section.

(g) Fees and expenses to prevailing defendant. — In civil actions brought under this section by the United States, the provisions of section 2412(d) of title 28 shall apply.

(h) Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or

her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.

RULES ENABLING ACT

§ 2072. Rules of procedure and evidence; power to prescribe

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

Appendix T

The False Claims Act (Original), Mar. 2, 1863, ch. 67, 12 Stat. 696 (1863)

March 2, 1863. CHAP. LXVII. — *An Act to present and punish Friends upon the Government of the United States.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person in the land or naval forces of the United States, or in the militia in actual service of the United States, in time of war, who shall make or cause to be made, or present or cause to be presented for payment or approval to or by any person or officer in the civil or military service of the United States any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent; any person in such forces or service who shall, for the purpose of obtaining, or aiding in obtaining, the approval or payment of such claim, make, use, or cause to be made or used, any false bill, receipt, voucher, entry, roll account, claim, statement, certificate, affidavit, or deposition, knowing the same to contain any false or fraudulent statement or entry; any person in said forces or service who shall make or procure to be made, or knowingly advise the making of any false oath to any fact, statement, or certificate, voucher or entry, for the purpose of obtaining, or of aiding to obtain, any approval or payment of any claim against the United States, or any department or officer thereof; any person in said forces or service who, for the purpose of obtaining or enabling any other person to obtain from the Government of the United States, or any department or officer thereof, any payment or allowance, or the approval or signature of any person in the military, naval, or civil service of the United States of or to any false, fraudulent, or fictitious claim, shall forge or

counterfeit, or cause or procure to be forged or counterfeited, any signature upon any bill, receipt, voucher, account, claim, roll, statement, affidavit, or deposition; any person in said forces or service who shall utter or use the same as true or genuine, knowing the same to have been forged or counterfeited; any person in said forces or service who shall enter into any agreement, combination, or conspiracy to cheat or defraud the Government of the United States, or any department or officer thereof, by obtaining, or aiding and assisting to obtain, the payment or allowance of any false or fraudulent claim; any person in said forces or service who shall steal, embezzle, or knowingly, and wilfully misappropriate or apply to his own use or benefit, or who shall wrongfully and knowingly sell, convey, or dispose of any ordnance, arms, ammunition, clothing, subsistence stores, money, or other property of the United States, furnished or to be used for the military or naval service of the United States; any contractor, agent, paymaster, quartermaster, or other person whatsoever in said forces or service having charge, possession, custody, or control of any money or other public property, used or to be used in the military or naval service of the United States, who shall, with intent to defraud the United States, or wilfully to conceal such money or other property, deliver or cause to be delivered to any other person having authority to receive the same any amount of such money or other public property less than that for which he shall receive a certificate or receipt; any person in said forces or service who is or shall be authorized to make or deliver any certificate, voucher, or receipt, or other paper certifying the receipt of arms, ammunition, provisions, clothing, or other public property so used or to be used, who shall make or deliver the same to any person without having full knowledge of the truth of the facts stated therein, and with intent to cheat, defraud, or injure the United States; any person in said forces or service

who shall knowingly purchase or receive, in pledge for any obligation or indebtedness, from any soldier, officer, or other person called into or employed in said forces or service, any arms, equipments, ammunition, clothes, or military stores, or other public property, such soldier, officer, or other person not having the lawful right to pledge or sell the same, shall be deemed guilty of a criminal offence, and shall be subject to the rules and regulations made for the government of the military and naval forces of the United States, and of the militia when called into and employed the actual service of the United States in time of war, and to the provisions of this act. And every person so offending may, be arrested and held for trial by a court-martial, and if found guilty shall be punished by fine and imprisonment, or such other punishment as the court-martial may adjudge, save the punishment of death.

SEC. 2. *And be it further enacted,* That any person heretofore called or hereafter to be called into or employed in such forces or service, who shall commit any violation of this act and shall afterwards receive his discharge, or be dismissed from the service, shall, notwithstanding such discharge or dismissal, continue to be liable to be arrested and held for trial and sentence by a court-marital, in the same manner and to the same extent as if he had not received such discharge or been dismissed.

SEC. 3. *And be it further enacted,* That any person not in the military or naval forces of the United States, nor in the militia called into or actually employed in the service of the United States, who shall do or commit any of the acts prohibited by any of the foregoing provisions of this act, he shall forfeit and pay to the United States the sum of two thousand dollars, and, in addition, double the amount of damages which the

United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit, and every such person shall in addition thereto, on conviction in any court of competent jurisdiction, be punished by imprisonment not less than one, nor more than five years, or by fine of not less than one thousand dollars, and not more than five thousand dollars.

SEC. 4. *And be it further enacted,* That the several district courts of the United States, the circuit court of the District of Columbia, or any court therein to be established having general jurisdiction in civil cases, the several district courts of the Territories of the United States within whose jurisdictional limits the person doing or committing such act shall be found, shall, wheresoever such act may have been done or committed, have full power and jurisdiction to hear, try, and determine such suit. Such suit may be brought and carried on by any, person, as well for himself as for the United States; the same shall be at the sole cost and charge of such person, and shall be in the name of the United States, but shall not be withdrawn or discontinued without the consent, in writing, of the judge of the court and the district attorney, first filed in the case, setting forth their reasons for such consent.

SEC. 5. *And be it further enacted,* That it shall be the duty of the several district attorneys of the United States for the respective districts for the District of Columbia, and for the several Territories, to be diligent in inquiring into any violation of the provisions of this act by persons liable to such suit, and found within their respective districts or territories, and to cause him or her to be proceeded against in due form of law for the recovery of such forfeiture and damages. And such person may

be arrested and held to bail in such sum as the district judge may order, not exceeding the said sum of two thousand dollars, and twice the amount of the damages sworn to in the affidavit of the person bringing the suit.

SEC 6. *And be it further enacted,* That the person bringing said suit and prosecuting it to final judgment shall be entitled to receive one half the amount of such forfeiture, as well as one half the amount of the damages he shall recover and collect; and the other half thereof shall belong to and be paid over to the United States; and such person shall be entitled to receive to his own use all costs the court may award against the defendant, to be allowed and taxed according to any provision of law or rule of court in force, or that shall be in force in suits between private parties in said court: *Provided*, That such person shall be liable for a costs incurred by himself in the case, and shall have no claim therefor on the United States.

SEC 7. *And be it further enacted,* That every such suit shall be commenced within six years from the doing or committing the act, and not afterwards.

SEC. 8. *And be it further enacted,* That no officer or agent of any banking or other commercial corporation, and no member of any mercantile or trading firm, or person directly or indirectly interested in the pecuniary profits or contracts of such corporation or firm, shall be employed or shall act as an officer or agent of the United States for the transaction of business with such corporation or firm; and every such *such* officer agent, or member, or person, so interested, who shall so act, upon conviction thereof, be punished by a fine of not more than two thousand dollars nor less than five hundred dollars, and by imprisonment for a term not exceeding two years.

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SEC. 9. *And it be further enacted,* That all acts and parts of acts inconsistent with or repugnant to any of the provisions of this act are hereby repesled, saving, however, and excepting any and all suits or prosecutions now commenced pending, and all rights of suit or prosecution under any prior act of Congress, on account of the doing or committing of any act hereby prohibited; and all rights and claims which the United States, or any person or persons, now have, growing out of such prior act; all which pending suits and prosecutions shall proceed and be determined, and all which rights and claims shall remain and be as valid and effectual as if this present act had not been passed; nor shall this act be so construed as in any way to impair or affect the obligation, duty, or liability of any person who now is or shall hereafter become the surety of any person contracting with the United States, or any officer or agent thereof; but every such surety shall be liable and answerable for the default of his principal in the same manner as if this act had not been passed, save to the extent to which his principal has performed the contract, or, if damages have been so recovered, to the extent of one half of the damages so recovered and paid; which last amount may be shown in reduction of damages in any suit brought against the principal and surety, or principals and sureties, on their contract.

APPROVED, March 2, 1863.

Appendix T

The False Claims Act (Amended 1943)
31 U.S.C. § 232-235 (1976)

[CHAPTER 377]

AN ACT

To limit private suits for penalties and damages arising out of frauds against the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That section 3491 of the Revised Statutes (U.S.C., title 31, sec. 232) be, and it hereby is, amended to mid as follows:

"SEC. 3491 (A). The several district courts of the United States, the District Court of the United States for the District of Columbia, the several district courts of the Territories of the United States, within whose jurisdictional limits the person doing or committing such act shall be found, shall wheresoever such act may have been done or committed, have full power and jurisdiction to hear, try, and determine such suit.

"(B) Except as hereinafter provided, such suit may be brought and carried on by any person, as well for himself as for the United States. The same shall be at the sole cost and charge of such person, and shall be in the name of the United States, but shall not be withdrawn or discontinued without the consent, in writing, of the judge of the court and the district attorney, first filed in the case, setting forth their reasons for such consent.

Appendix T

"(C) Whenever any such suit shall be brought by any person under clause (B) notice of the pendency of such suit shall be given to the United States by serving upon the United States attorney for the district in which such suit shall have been brought a copy of the bill of complaint and by sending, by registered mail, to the Attorney General of the United States at Washington, District of Columbia, a copy of such bill together with a disclosure, in writing of substantially all evidence and in formation in his possession material to the effective prosecution of such suit. The United States shall have sixty days after service as above provided, within which to enter appearance in such suit. If the United States shall fail, or decline in writing to the court, during said period of sixty days to enter any such suit, such person may carry on such suit. If the United States within said period shall enter appearance in such suit the same shall be carried on solely by the United States. In carrying on such suit the United States shall not be bound by any action taken by the person who brought it, and may proceed in all respects as if were instituting the suit: *Provided.* That if the United States shall fail to carry on such suit with due diligence within a period of six months from the date of its appearance therein, or within such additional time as the court after notice may allow, such suit may be carried on by the person bringing the same in accordance with clause (B) above. The court shall have no jurisdiction to proceed with any such suit brought under clause (B) or pending suit brought under section 3491 of the Revised Statutes whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought: *Provided, however*, That no abatement shall be had as to a suit pending at the effective date of this Act if before such suit was filed such person had in his possession and voluntarily disclosed to the

Attorney General substantial evidence and information which was not theretofore in the possession of the Department of Justice.

(D) In any suit whether or not on appeal pending at the effective date of this Act brought under Revised Statutes, section 3491, the court in which such is pending shall stay all further proceedings, and shall forthwith cause written notice, by registered mail to be given the Attorney General that such suit is pending, and the Attorney General shall have sixty days from the date of such notice to appear and carry on such suit in accordance with clause (C).

"(E) (1) In any such suit, if carried on by the United States as therein provided, the court may award to the person who brought such suit, out of the proceeds of such suit or any settlement of any claim involved therein, which shall be collected, an amount which in the judgment of the court is fair and renewable compensation to such person for disclosure of the information or evidence not in the possession of the United States when such suit was brought. And such award shall in no event exceed one-tenth of the proceeds of such suit or any settlement thereof.

"(2) In any such suit when not carried on by the United States as herein provided, whether heretofore or hereafter brought, the court may award to the person who brought such suit and prosecuted it to final judgment, or to settlement, as provided in clause (B), out of the proceeds of such suit or any settlement of any claim involved therein, which shall be collected, an amount, not in excess of one-fourth of the proceeds of such suit or any settlement thereof, which in the judgment of the court is fair and reasonable compensation to such person

for the collection of any forfeiture and damages; and such person be entitled to receive to his own use such reasonable expenses as the court shall find to have been necessarily incurred and all costs the court may award against the defendant, to be allowed and taxed according to any provision of law or rule of court in force, or that shall be in force in suits between private parties in said court: *Provided*, That such person shall be liable for the costs incurred by himself in such and shall have no claim therefor on the United States."

SEC. 2. Section 3493 of the Revised Statutes (U.S.C., title 31, sec. 234) is hereby repealed.

Approved December 23, 1943.

APPENDIX U — EXCERPT FROM FINAL CONSIDERATION OF CONFERENCE REPORT ON FALSE CLAIMS AMENDMENTS ACT OF 1986, 132 CONG. REC. 9388-89 (OCT. 7, 1986)

* * *

Mr. BERMAN. Mr. Speaker, reserving the right to object, under my reservation, I simply want to congratulate the gentleman from Kansas [Mr. GLICKMAN], the chairman of the subcommittee, for in a very brief period of time, in less than 9 months, taking an issue which had been laying around in Congress for several years and moving forward, negotiating with a variety of parties and putting together what I think will soon be seen as perhaps the most effective antifraud legislation we will have enacted in this session of Congress.

I also would like to point out that the final version of the bill, as amended, that is before us at this time preserves and strengthens the role of the person imitating the action even if the Government enters the case.

The law makes clear that this person, the qui tam plaintiff, will be a party to the action with all the rights and responsibilities that a party receives under the Federal Rules of Civil Procedure.

The court may imposed some limitations on the party's full participation only if the Government meets its burden of establishing that the person's conduct has violated the following standards set forth to the act: Undue delay, repetitious, irrelevant, interference or harassment.

(Mr. BERMAN asked and was given permission to revise and extend his remarks.)

Appendix U

Mr. BERMAN. Mr. Speaker, I include the following legislative history for the RECORD.

LEGISLATIVE HISTORY

I. ROLE OF THE PARTY

The final version of the Bill preserves and strengthens the role of the person initiating the action even if the Government enters the case. The law makes clear that this person ("qui tam" plaintiff) will be a "party" to the action with all the rights and responsibilities that a party receives under the Federal Rules of Civil Procedure. The Court may impose some limitations on the party's full participation only if the Government meets its burden of establishing that the person's conduct has violated the following standards set forth in the Act: undue delay, repetitious, irrelevant, interference or harassment. The term "interfere" with the government's ability to prosecute the case is intended to mean some specific action proposed by the qui tam plaintiff which will have the likely probability of significantly disrupting the government's prosecution of the case. Inconvenience or minor disruption will not meet this standard. Moreover, a certain amount of overlap and inefficiency is expected with the dual participation of both the government and the qui tam plaintiff on the same side, but it is an anticipated part of the trade-off to bring to bear an increased amount of legal resources on behalf of the government's interest.

The term "repetitious" refers to the situation where without good cause the qui tam plaintiff repeats what the government has already done. It is not intended to limit what the qui tam plaintiff may do because the government is planning on a similar litigation activity in the future.

Appendix U

"Undue delay" is most likely to be applied in the context of the trial itself rather than pre-trial activity. If the qui tam plaintiff, for example, proposes to call numerous witnesses whose testimony may have little probative value, the Court may limit such testimony. Also, the term "undue delay" requires a showing by the government that the significant delay that may be cause by the specific activity proposed by the qui tam plaintiff and objected to by the government will substantially outweigh any possible benefit that would be obtained for the plaintiff's case.

The law that we vote on today is intended to encourage a working partnership between both the Government and the qui tam plaintiff. The public will be well served by having more legal resources brought to bear against those who defraud the Government. The qui tam plaintiff's role should be curtailed only when counsel for the qui tam plaintiff either lacks the competence to participate or when the person conducts himself in such a way in the federal court proceedings that results in undercutting the Government's ability to prosecute the case.

Another reason for providing for this full party status is to keep pressure on the Government to pursue the case in a different fashion. Even the United States Government is not without financial limitations. It is not uncommon for Government attorneys to be overworked and underpaid, given the demanding tasks and frequently overwhelming case loads they maintain. I do not say this to impune the ability or character of Government attorneys, but only to reflect the harsh reality of today's funding limitations of Government activities in all areas which include the budgets of the government's prosecuting agencies. If the government can pass a law that will increase the resources available to confront fraud against

the government without paying for it with taxpayers' money, we are all better off. This is precisely what this law is intended to do: deputize ready and able people who have knowledge of fraud against the government to play an active and constructive role through their counsel to bring to justice those contractors who overcharge the government.

Settlement of Lawsuits

While the law enables the Government to enter into a settlement with the defendant, it does require Court review of that settlement to determine whether it is fair, adequate and reasonable under all the circumstances, the same test that courts now apply to the settlement of class action claims. The person initiating the action is given an opportunity to object to the settlement, including the development and presentation of evidence at a hearing, before the court makes its final determination as to fairness.

* * *

APPENDIX V — EXCERPTS FROM *AMICUS CURIAE* BRIEF FILED BY UNITED STATES IN *U.S. EX REL. MARCUS v. HESS*, 317 U.S. 537 (1943)

[Pages 19-21]

If the statute is construed to permit informer suits of the character of the suits now before this Court, the enforcement of the law will not be promoted. It is the duty of the Attorney General to enforce the laws of the United States and to take appropriate legal action to protect the public interest. . . . In the light of the facts of a particular case he may subsequently decide that the public interest requires the institution of a criminal and a civil proceeding simultaneously, or a criminal proceeding to be followed by a suit for an injunction or for damages. . . . On the other hand, the Attorney General may decide that the public interest requires that an action should be temporarily delayed or postponed. For example, at the present time he may decide that a particular action would injure the war effort and should not be now initiated. Moreover, the filing of a suit in one case may adversely affect another suit. Effective law enforcement dictates that the control of litigation on behalf of the United States be under the direction of the Attorney General who is able to act at all times exclusively in the public interest. If it is possible for a private individual to commence an action after the Attorney General has instituted proceedings, but before action by the United States is yet complete, then it is no longer possible for the Attorney General to control proceedings brought on behalf of the United States in such a way as to protect the public interest. Such a private suit may prevent the Government from taking steps which it believes are essential to the protection of the public in connection with the instant suit or in connection with a different suit.

(2)

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No. 98-473

In the Supreme Court of the United States

OCTOBER TERM, 1998

UNITED STATES OF AMERICA EX REL. SEQUOIA ORANGE COMPANY, ET AL., PETITIONERS

v.

SUNKIST GROWERS, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the courts below correctly held that the False Claims Act, 31 U.S.C. 3730, authorizes the government to dismiss an arguably meritorious *qui tam* action when dismissal is in the interests of the United States.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 151 F.3d 1139. The opinion of the district court (Pet. App. 18a-84a) is reported at 912 F. Supp. 1325.

JURISDICTION

The judgment of the court of appeals was entered on June 19, 1998. The petition for a writ of certiorari was filed on September 17, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Agricultural Marketing Agreement Act of 1937 (AMAA), 7 U.S.C. 601 *et seq.*, authorizes restric-

tions, called prorate restrictions, on the amount of commodities that can enter a particular market. "The Act contemplates a cooperative venture among the Secretary [of Agriculture], handlers, and producers the principal purposes of which are to raise the price of agricultural products and to establish an orderly system for marketing them." *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 346 (1984). When a handler exceeds a prorate restriction under the AMAA, the handler is subject to civil forfeiture of the value of the excess shipment. 7 U.S.C. 608a(5).

2. The False Claims Act (FCA), 31 U.S.C. 3729 *et seq.*, establishes substantial civil penalties for any person who commits any of a variety of fraudulent acts against the United States. 31 U.S.C. 3729(a)(1)-(7). Such a person "is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains." 31 U.S.C. 3729(a).

Suits to collect the statutory penalties may be brought by the Department of Justice. 31 U.S.C. 3730(a). Alternatively, a private person (known as a relator) may bring a *qui tam* action on behalf of the United States. 31 U.S.C. 3730(b)(1).[1] If a *qui tam* action is brought, the statute provides the government the opportunity to intervene in the suit "within 60 days after it receives both the complaint and the material evidence and information," 31 U.S.C. 3730(b)(2), in which case the government "shall have the primary responsibility for prosecuting the action, and shall not

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[1] If a *qui tam* action results in the recovery of civil penalties, those penalties are divided between the government and the relator. 31 U.S.C. 3730(d)(1) and (2). The award to the relator may not exceed 30% of the total recovery. 31 U.S.C. 3730(d)(2).

be bound by an act of the person bringing the action," 31 U.S.C. 3730(c)(1). If the government does not intervene within the initial 60-day period, "the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause." 31 U.S.C. 3730(c)(3). The FCA further provides that the government may "dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion." 31 U.S.C. 3730(c)(2)(A).

3. Petitioner Sequoia Orange Company is a citrus packinghouse. Petitioner Lisle Babcock is an orange grower. Respondent Sunkist Growers, Inc., is an agricultural cooperative, with affiliated packinghouses and member growers, many of which are also respondents here. During the 1980s, petitioners and respondents were subject to orange and lemon marketing orders issued by the Secretary pursuant to the AMAA. Pet. App. 3a. Beginning in 1988, petitioners filed a number of *qui tam* complaints against respondents alleging that respondents had violated the prorate provisions of those marketing orders. *Id.* at 2a-3a. During roughly the same period, the government filed numerous enforcement actions against petitioners and others alleging violations of the prorate provisions. *Id.* at 3a.

Because widespread violation of the prorate restrictions suggested industry-wide dissatisfaction with the existing marketing order regime, the government eventually suspended the prorate restrictions and sought a global settlement of all pending litigation in an attempt to end the wasteful legal feuding in the indus-

try. In order to facilitate its effort to obtain a global settlement, the government intervened in the instant actions under the FCA. Pet. App. 3a-4a.

Once growing divisiveness in the citrus industry and an intervening district court ruling made a global settlement unlikely, the government decided to terminate the citrus prorate restrictions, dismiss all pending enforcement actions, and dismiss the instant *qui tam* actions. Pet. App. 33a-35a. The government sought dismissal in order to end divisiveness in the citrus industry; to enable the development and implementation of new prorate restrictions and other marketing tools with the support of the citrus industry; and to end litigation costly to the citrus industry and taxpayers. *Id.* at 5a. The government conceded for purposes of its dismissal motion that the *qui tam* actions were meritorious. *Id.* at 7a. Petitioners objected to dismissal, arguing that the government's authority to obtain dismissal of a *qui tam* action pursuant to 31 U.S.C. 3730(c)(2)(A) does not extend to dismissal of a meritorious suit. Pet. App. 6a-7a.

4. The district court granted the government's motion to dismiss the pending *qui tam* suits. Pet. App. 18a-84a. The court stated that review of the government's decision to dismiss the suits pursuant to 31 U.S.C. 3730(c)(2)(A) "is limited to determining whether the government has a legitimate government interest that will be achieved by dismissal, which is not arbitrary or otherwise illegal." Pet. App. 51a. The court concluded that dismissal of the suits was rationally related to the government's legitimate interest in ending industry divisiveness, *id.* at 54a-57a; facilitating future voluntary industry regulation, *id.* at 57a-61a; conserving private and government resources, *id.* at 62a-66a; and providing equitable treatment to all

violators of the prorate restrictions, *id.* at 66a-67a. The court also held that the government's decision to dismiss the actions was not arbitrary or capricious and that the decision was not motivated by unlawful or improper considerations. *Id.* at 68a-81a.

5. The court of appeals affirmed. Pet. App. 1a-17a. The court of appeals agreed with the district court that the government's decision to dismiss the suits should be judged under a rational basis standard. *Id.* at 11a. The court held that the government had rationally determined that dismissal of the suits was in the interest of the government and of the citrus industry. *Id.* at 13a-15a. It noted in particular that "the government deemed further FCA litigation over prorate violations harmful to the industry as a whole," and that "[d]ismissal enabled the government to treat all alleged prorate violators equally by dismissing all enforcement actions." *Id.* at 14a.

ARGUMENT

The decision below is correct and does not conflict with any decision of this Court or of any other court of appeals. The petition for a writ of certiorari should therefore be denied.

1. Contrary to petitioners' contention (Pet. 20-21), the court of appeals' decision does not conflict with this Court's recent ruling in *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 117 S. Ct. 1871 (1997). The Court in *Hughes Aircraft* addressed the question whether a 1986 amendment to the FCA, which expanded the circumstances under which *qui tam* suits may be brought, was applicable to suits alleging misconduct that predated the 1986 amendment. The Court held that retroactive application was inappropriate

because the 1986 amendment "essentially create[d] a new cause of action." *Id.* at 1878.

In the course of its opinion, the Court observed that because *qui tam* relators "are motivated primarily by prospects of monetary reward rather than the public good," they "are less likely than is the Government to forego an action arguably based on a mere technical noncompliance with reporting requirements that involved no harm to the public fisc." 117 S. Ct. at 1877. Contrary to petitioners' apparent contention (Pet. 20), however, the Court did not suggest that the FCA entitles a relator to pursue a *qui tam* action notwithstanding the government's determination that continued litigation will disserve the public interest. Indeed, the Court noted that "[t]he Government chose not to intervene * * * nor did it move to dismiss the action, *as it was likewise entitled to do*, see § 3730(c)(2)(A)." 117 S. Ct. at 1875 n.2 (emphasis added).[2]

2. Petitioners also contend (Pet. 11 n.6) that the decision of the court of appeals conflicts with prior decisions interpreting the pre-1986 version of the FCA. Because the pre-1986 version of the FCA contained no provision similar to current Section 3730(c)(2)(A), how-

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[2] Petitioners' reliance (Pet. 22) on *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 546-547 (1943), is misplaced. The portion of *Marcus* quoted by petitioners sets forth the unremarkable proposition that judicial construction of a statute should be governed by the statutory text rather than by the court's own assessment of sound public policy. The court of appeals' decision in the instant case is fully consistent with that principle. Section 3730(c)(2)(A) unambiguously authorizes the government to dismiss a *qui tam* action notwithstanding the relator's objection, and nothing in the statutory text suggests that the authority is limited to cases where the *qui tam* suit is shown not to be meritorious.

ever, the cited decisions are not instructive. Since the enactment of that provision in 1986, no court other than the courts below has specifically addressed the question whether the government may obtain the dismissal of a potentially meritorious *qui tam* suit over the relator's objection. The lower courts have consistently recognized, however, that under Section 3730 in its current form, the government retains broad authority to ensure that *qui tam* litigation is conducted in a manner that serves the public interest.[3]

3. Petitioners contend that the government may obtain dismissal of a *qui tam* action over the relator's objections only if (a) the action lacks merit and is subject to dismissal under Rule 12 or Rule 56 of the Federal Rules of Civil Procedure (Pet. 11-13), or (b) the district court finds, pursuant to Rule 41(a)(2) of the

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[3] See *United States ex rel. Rodgers* v. *Arkansas*, 154 F.3d 865, 868 (8th Cir. 1998) (recognizing that "[a] great deal of Section 3730 establishes as superior the role of the government in the prosecution of *qui tam* suits," including the provision that authorizes the government to dismiss "subject only to notice and a hearing for the *qui tam* relator"); *United States ex rel. Taxpayers Against Fraud* v. *General Elec. Co.*, 41 F.3d 1032, 1041 (6th Cir. 1994) (Executive Branch retains primacy in *qui tam* actions because it "may move to have the relator's litigation role significantly restricted, even as it may conduct settlement talks or even decide that the case should be dismissed"); *Juliano* v. *Federal Asset Disposition Ass'n*, 736 F. Supp. 348, 351 (D.D.C. 1990) ("Under our federal scheme, the Attorney General * * * decides whom to prosecute for violations of federal law. The Court will not assume that the qui tam provisions of the False Claims Act were intended to curtail the prosecutorial discretion of the Attorney General."), aff'd, 959 F.2d 1101 (D.C. Cir. 1992) (Table); *United States ex rel. Stillwell* v. *Hughes Helicopters, Inc.*, 714 F. Supp. 1084, 1090 (C.D. Cal. 1989) ("If the suit threatens to compromise criminal law enforcement efforts, national security, or other interests, the government may move to dismiss the complaint or stay discovery at any time.").

Federal Rules of Civil Procedure, that dismissal of the suit will not prejudice the relator (Pet. 13-15). Those arguments lack merit.

a. Nothing in the text or history of Section 3730(c)(2)(A) suggests that the government's authority to dismiss a *qui tam* action is limited to suits that lack merit. The only textual limit on the government's power to dismiss is the requirement that the relator be "notified" and receive "an opportunity for a hearing." 31 U.S.C. 3730(c)(2)(A). Because the statute expressly provides more rigorous standards for terminating an action in other ways, see 31 U.S.C. 3730(c)(2)(B) (settlement must be "fair, adequate, and reasonable"), 3730(b)(1) (relator may dismiss suit only with consent of government), the absence of any standard in Section 3730(c)(2)(A) is telling. Petitioners' construction of Section 3730(c)(2)(A) would also render that Section largely superfluous, since the government's authority to move for dismissal of a meritless suit would be duplicative of the defendant's ability to seek the same result.

As this Court has recognized, federal law enforcement personnel typically possess broad prosecutorial discretion and are under no obligation to pursue an enforcement action in every case where they believe that a violation has occurred. See *Heckler* v. *Chaney*, 470 U.S. 821, 831-832 (1985); see also *United States* v. *Armstrong*, 517 U.S. 456, 465 (1996) (judicial deference to prosecution decisions "stems from a concern not to unnecessarily impair the performance of a core executive constitutional function"). The reasons advanced by the government in support of its decision to dismiss petitioners' *qui tam* actions (see p. 4, *supra*) are entirely appropriate bases for the exercise of prose-

cutorial discretion.[4] Because a *qui tam* action is brought on behalf of the United States and serves to redress fraud perpetrated upon the government, government officials should similarly be permitted to obtain dismissal of even a potentially meritorious *qui tam* suit if they determine that continued litigation will disserve the public interest.[5] Precisely because a private relator is "motivated primarily by prospects of monetary reward rather than the public good," *Hughes Aircraft*, 117 S. Ct. at 1877, Section 3730(c)(2)(A) enables the government to protect the public interest in cases where a potentially meritorious *qui tam* action entails costs that the government believes outweigh its benefits. Cf. *Confiscation Cases*, 74 U.S. (7 Wall.) 454,

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[4] Petitioners suggest (Pet. 16-18) that the government violated the Constitution when it declined to pursue enforcement actions against apparent violators of the prorate restriction. That claim is without foundation in the law. The government's dismissal here manifestly was not "an abdication of its statutory responsibilities," *Chaney*, 470 U.S. at 833 n.4; rather, dismissal wiped the slate clean so that the government could better fulfill its statutory responsibilities under the AMAA. As the court of appeals recognized, the government sought to end industry divisiveness in order to make possible the implementation of a new, consensus prorate restriction. See Pet. App. 13a.

[5] The Senate Report accompanying an earlier version of the 1986 FCA amendments explains that the relator is permitted to object to the settlement or dismissal of a *qui tam* suit "as a check that the Government does not neglect evidence, cause undu[e] delay, or drop the false claims case without legitimate reason." S. Rep. No. 345, 99th Cong., 2d Sess. 26 (1986). In the instant case, the government gave "legitimate reason[s]" for its decision to dismiss the suit, and both of the courts below found that the decision was rational. Nothing in the legislative history of the 1986 amendments suggests that the government's authority to dismiss *qui tam* litigation is limited to suits that are demonstrably without merit.

458 (1868) (government has the authority to dismiss a successful forfeiture action even though the dismissal deprives an informer of his statutorily established bounty). In sum, the court of appeals correctly ruled that dismissal is appropriate when it furthers a legitimate public interest.[6]

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[6] Contrary to petitioners' contention (Pet. 24 n.10), the approach taken by the government in this case does not constitute a reversal of a previously settled Department of Justice position. The Office of Legal Counsel (OLC) memorandum on which petitioners rely (see *Constitutionality of the Qui Tam Provisions of the False Claims Act*, 13 Op. Off. Legal Counsel 207 (1989)) does not address the specific question presented here. To the extent that the OLC memorandum construed the FCA as authorizing broad judicial oversight of government litigating decisions, it did so in the course of arguing that the FCA's *qui tam* provisions intrude on the President's executive prerogatives and are therefore unconstitutional. See *id.* at 228-232. As we have previously explained, the OLC memorandum was not a formal OLC opinion and has never reflected the official position of the Department of Justice. See 95-1340 U.S. Amicus Br. (On Petition for Writ of Certiorari) 16 n.10 *Hughes Aircraft*, *supra*. In *Hughes Aircraft*, the government argued (see Br. on Pet. for Writ of Cert. 16-20) that the *qui tam* provisions do not violate separation of powers principles and are otherwise constitutional, and the Court declined to grant certiorari on the petitioner's constitutional claim. See 117 S. Ct. 293 (1996) (limiting grant of certiorari). Finally, acceptance of the views expressed in the OLC memorandum would scarcely assist petitioners, since OLC deemed unconstitutional the very statutory provisions under which petitioners seek to recover.

The testimony of former Assistant Attorney General Stuart Gerson cited by petitioners (see Pet. 24 n.10) also does not address the question whether the FCA permits the government to dismiss a potentially meritorious *qui tam* suit based on countervailing public policy considerations. See *False Claims Act Technical Amendments of 1992: Hearing Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 102d Cong., 2d Sess. 24-26 (1992).

b. Petitioners' reliance on Federal Rule of Civil Procedure 41(a)(2) is also misplaced. Rule 41(a)(2) serves to protect defendants from legal prejudice and requires a balancing of the equities between the defendant and the plaintiff. See, *e.g.*, *Ohlander* v. *Larson*, 114 F.3d 1531, 1537 (10th Cir. 1997) (citing cases), cert denied, 118 S. Ct. 702 (1998); cf. *Jones* v. *Securities & Exchange Comm'n*, 298 U.S. 1, 19 (1936). Rule 41(a)(2) does not address the respective interests of the United States and a relator in a *qui tam* action when the United States seeks dismissal. Section 3730, by contrast, specifically addresses the unique procedural problems that arise when a relator sues on behalf of the United States in a *qui tam* suit. The legal prejudice standard of Rule 41(a)(2) is therefore inapplicable.

4. Contrary to petitioners' argument (Pet. 18-20), the court of appeals correctly ruled that dismissal of this case was rational. The district court carefully considered the relevant facts, and its findings (Pet. App. 54a-81a), affirmed by the court of appeals, need not be reviewed. See *Branti* v. *Finkel*, 445 U.S. 507, 512 n.6 (1980). The court of appeals also correctly concluded that ending the *qui tam* suit was rationally related to the government's legitimate interest in attempting to bring peace to the citrus industry, promoting potential future regulation, conserving taxpayer and private resources, and achieving equity.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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